United States Court of Appeals

for the Second Circuit

APPENDIX

Signed

B

74-1166

No. 74-1166

P/S

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

PHILIP HANDELMAN and ESTHER HANDELMAN,

Appellees

v.

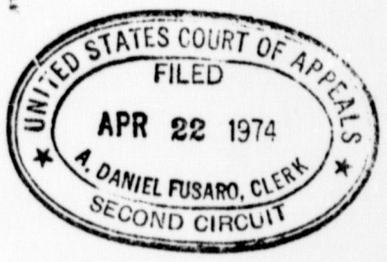
COMMISSIONER OF INTERNAL REVENUE,

Appellant

ON APPEAL FROM THE DECISION OF THE

UNITED STATES TAX COURT

APPENDIX



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TAX COURT OF THE UNITED STATES

GENERAL DOCKET

DOCKET NO. 4913-67

CLASS

PHILIP HANDELMAN & ESTHER HANDELMAN

5 Tudor City Place, New York, N.Y. 10017

PETITIONER.

VS.

COMMISSIONER OF INTERNAL REVENUE.

RESPONDENT.

APPEARANCES FOR PETITIONER: (B W/D 6/6/72)

NAME Thomas P. Dougherty, 630 Fifth Avenue, New York, New York, 10020 (8/2/72)

ADDRESS

Date Month Day Year	Filings and Proceedings	Action	Served
Sept. 28, 1967	PETITION FILED: FEE PAID Sept. 28, 1967		Sept. 28, 1967
Nov. 20, 1967	REQUEST by Resp. for trial at New York, N.Y.	GRANTED 11/20/67	Nov. 22 1967
Nov. 20, 1967	ANSWER filed by Respondent.		NOV 22 1967
Dec. 31, 1969	NOTICE OF TRIAL on March 23, 1970, at New York, N. Y.		Dec. 31, 1969
March 12, 1970	MOTION by Petr. to continue from March 23, 1970, New York, N.Y. (No Obj. Resp.)	GRANTED 3/13/70 Cont. Generally	Mar. 25, 1970
July 23, 1970	NOTICE OF TRIAL at N.Y., N.Y. on Oct. 26, 1970		July 23, 1970
Oct. 26 & 29, 1970	HEARING before Judge Tannenwald, Jr. at N.Y., N.Y.		
	Report on status of case & Calendar Call Oct. 26, 1970		
	Joint Motion for Continuance filed 10/29/70 to continue Generally - GRANTED 10/29/70		Dec. 15, 1970
Nov. 9, 1970	TRANSCRIPT of Hearing Oct. 26, 1970 received		
Nov. 9, 1970	TRANSCRIPT of Hearing Oct. 29, 1970 received.		
Apr. 5, 1971	NOTICE OF TRIAL at N.Y., N.Y. on June 21, 1971		Apr. 5, 1971
May 26, 1971	MOTION by petr for continuance from June 21, 1971 and restore to general docket	GRANTED June 9, 1971	June 15, 1971
Oct. 27, 1971	NOTICE OF TRIAL at N.Y., NY on Jan. 24, 1972		Oct. 27, 1971

(Continued to Page 2)

TAX COURT OF THE UNITED STATES

GENERAL DOCKET

DOCKET NO. 4313-67

(Continuation)

PHILIP HANDELMAN AND ESTHER HANDELMAN

PETITIONER PAGE

Date Month Day Year	Filings and Proceedings	Action	Served
Jan. 25 & Feb. 3, 1972	TRIAL at New York, N. Y. before Judge Quealy.		
	Petrs. Memorandum of Law regarding the graphic arts		Feb. 15,
	transaction filed Feb. 3, 1972.		
	STIPULATION OF FACTS NO. 1 filed.		
	ORIGINAL BRIEFS DUE - March 20, 1972		
	REPLY BRIEFS DUE - April 19, 1972		
	SUBMITTED TO JUDGE QUEALY		
Feb. 23, 1972	TRANSCRIPT of Jan. 25, Feb. 3, 1972 rec'd. (2)		
Mar. 15, 1972	MOTION by Resp. to extend time to April 20, 1972 within	GRANTED	March 20,
	which to file Brief.	March 17, 1972	
Apr. 18, 1972	MOTION by Petr. to extend time to May 30, 1972 within		
	which to file Brief.	GRANTED Apr. 19, 1972	Apr. 20, 1
May 24, 1972	MOTION by Petr. to extend time to June 30, 1972 within		
	which to file Brief.	GRANTED May 25, 1972	May 26, 197
June 6, 1972	MOTION by Herman Jaffe for leave to withdraw as counsel		
	of record.	GRANTED June 6, 1972	June 8, 197
June 29, 1972	MOTION by Petr. to extend time to Aug. 17, 1972 within		
	which to file original brief.	GRANTED June 30, 1972	June 30, 1
June 30, 1972	BRIEF for Respondent filed.		Aug. 30, 19
Aug. 24, 1972	ENTRY OF APPEARANCE by Thomas P. Dougherty for petrs. filed.		Aug. 30, 19
Aug. 24, 1972	BRIEF for Petitioners filed. (Permission to file).		Aug. 30, 19
Sept. 29, 1972	REPLY BRIEF for Respondent filed		Oct. 6, 19
Oct. 2, 1972	REPLY BRIEF for Petitioners filed		Oct. 6, 19
	[illegible]		

U.S. GOVERNMENT PRINTING OFFICE 1969 O—525151
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TAX COURT OF THE UNITED STATES

GENERAL DOCKET

DOCKET NO. 4[illegible]-57

(Continuation)

PHILIP HANDELMAN & ESTER HANDELMAN PETITIONER PAGE 3.

Date Month Day Year	Filings and Proceedings	Action	Served
Mar. 7, 1973	MEMORANDUM FINDINGS OF FACT AND OPINION filed.		Mar. 7, 1973
	Judge Quealy.		
	Decision will be entered under Rule 50.		
Aug. 13, 1973	AGREED COMPUTATION filed.		
Aug. 16, 1973	DECISION ENTERED, Judge Quealy.		Aug. 16, 1973
Oct. 24, 1973	MOTION by Resp. for return of exhibit #34. (WITHDRAWN & (RETURNED TO (RESPONDENT.	See Order Dtd. Oct. 31, 1973	
Oct. 29, 1973	MOTION by Resp. to substitute copy of Exhibit and to	See Order Dtd.	
	withdraw Prior Motion for Return of Exhibit.	Oct. 31, 1973	
Oct. 31, 1973	ORDER, that resp. motion filed Oct. 29, 1973 is granted		NOV 2 1973
	in that copy of Exh. 34 received on Oct. 31, 1973 is		
	herewith submitted in the record in this case in lieu		
	of the original thereof. The Clerk of the Court is		
	hereby directed to return said Exh. to counsel for		
	petitioners; and further		
	ORDER, that resp. prior filed motion on Oct. 24, 1973		
	is deemed withdrawn.		
	APPELLATE PROCEEDINGS		
Nov. 13, 1973	NOTICE OF APPEAL to U.S.C.A., 2nd Cir., filed by Resp.		Nov. 14, 1973
Nov. 14, 1973	NOTICE of filing with copy of notice of appeal mailed		
	to Mr. Thomas P. Dougherty, counsel for petr.		Nov. 14, 1973
Nov. 14, 1973	NOTICE, to parties, of assembling and date for trans-		
	mission of the record.		Nov. 14, 1973
Dec. 4, 1973	MOTION by Respondent for extension of time for trans-		
	mission of record, with "No Obj." by Petrs.	GRANTED Dec. 5, 1973	Dec. 5, 1973

(Continued to page 4)

GPO 1973 O - 493-275

TAX COURT OF THE UNITED STATES

GENERAL DOCKET

DOCKET NO. 1913-67 (Continuation)

PHILIP HAIDELMAN and ESTHER HAIDELMAN — PETITIONER — PAGE

Date Month Day Year	Filings and Proceedings	Action	Served
Dec. 5, 1973	NOTICE, to parties, of assembling and extension of date for transmission of record.		Dec. 5, [illegible]

☐ Regular:
☐ Registered: POSTMARK DATE 9/26/67
☒ Certified:

FILED

THE TAX COURT OF THE UNITED STATES

1967 SEP 28 AM 9 44

WASHINGTON, D.C.

TAX COURT
OF THE
UNITED STATES

Mr. Philip Handelman and
Mrs. Esther Handelman,

Petitioners,

Docket No.

v.

4913-67

Commissioner of Internal Revenue,

Respondent.

PETITION

Petition for redetermination of the deficiencies set forth by the Respondent in his Notice of Deficiency (Bureau Symbols 6N6A-Ap:NY: RJG: MS) dated June 30, 1967, for the taxable years 1961, 1962, 1963, 1964 and 1965, is hereby made by the above-named Petitioners, and, as a basis for this proceeding, the Petitioners allege as follows:

1. The Petitioners are individuals with residence at 5 Tudor City Place, New York, New York 10017. Joint returns for the periods here involved were filed with the District Director of Internal Revenue, New York, New York.

2. The Notice of Deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the Petitioners on June 30, 1967.

3. The deficiency as determined by the Commissioner, is in Income Taxes for the claendar years 1961, 1962, 1963, 1964 and 1965 and for a negligence penalty for 1961, as set forth below:

Taxable Year	Type of Tax	Amount of Tax	Penalty
December 31, 1961	Income	$5,654.87	
December 31, 1961	Section 6653(a)		$282.74
December 31, 1962	Income	$37,192.35	
December 31, 1963	Income	$42,249.33	
December 31, 1964	Income	$ 1, 588.03	
December 31, 1965	Income	$ 2,758.78	

The entire sums of the above deficiencies are in controversy.

4. The determination of tax and negligence penalty set forth in the said Notice of Deficiency is based upon the following errors:

(a) The Respondent erred in determining that the taxpayers failed to include as income, moneys collected from the Graphic Arts Exhibit Building, Inc. transaction.

1962	$70,000.00
1963	$95,000.00

Whereas the taxpayers reported

1961	$25,000.00
1962	$40,000.00
1963	$30,000.00

In all of the conferences held, the total sum of $95,000.00 received from this transaction was admitted, and held to have been included in the taxpayer's returns. The only questions raised were:

Capital Gains

Installment Sale

(b) The Respondent erred in determining that the deduction for promotional expense (boat expense) be disallowed:

1961	$3526.56	
1961	$3265.65	depreciation
1962	$4796.92	
1963	$9107.25	
1964	$6849.87	
1965	$12,255.88	

(c) The respondent erred in determining that the deduction for the following expenses be disallowed:

YEAR	Entertainment	Rent	Office
1961	$2,135.75	$600.00	$2,408.41
1962	889.62	-	$1,200.00
1963	$2,083.84	-	-
1964	943.81	-	$1,200.00

(d) The Respondent erred in assessing a negligence penalty of 5% under Section 6653 (a) of the Internal Revenue Code of 1954.

5. The facts upon which the Petitioners rely as a basis for this proceeding are as follows:

(a) The Taxpayers will prove that -

1. Only $95,000.00 had been received and admitted to by the examining agent.

2. That these amounts had been included in the returns as filed.

3. A completed long term Capital Gains - Installment Sale did legally take place.

(b) The Taxpayers will prove that the Chee Chee V is used for promotional purposes only.

(c) These disallowances were made on an arbitrary basis, and were not based upon the facts and proof submitted to the Revenue agent.

(d) This assessment was made arbitrarily.

6. Wherefore, the Petitioners pray that this Honorable Court hear this proceeding and find and determine:

(a) That the deficiencies in income taxes for the years ended December 31, 1961, 1962, 1963, 1964 and 1965 be corrected ; and

(b) That the negligence penalty of $282.74 be set aside ; and

(c) Grant such other and further relief as this Honorable Court may seem just and proper.

Counsel for Petitioners
HERMAN JAFFE, C.P.A.
360 Lexington Avenue
New York, New York 10017

STATE OF NEW YORK)
CITY OF NEW YORK) ss.:
COUNTY OF NEW YORK)

PHILIP HANDELMAN and ESTHER HANDELMAN, being duly sworn, say that they are the petitioners above named ; that they have read the foregoing petition or had the same read to them ; that they are familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those they believe to be true.

PHILIP HANDELMAN

ESTHER HANDELMAN

Subscribed and sworn to before
me this 13th day of September, 1967.

NOTARY PUBLIC

ARTHUR H. SOBEL
Notary Public, State of New York
No. 41-3725005
Qualified in Queens County
Commission Expires March 30, 1969

U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
OFFICE OF REGIONAL COMMISSIONER
NORTH-ATLANTIC REGION
APPELLATE BRANCH OFFICE
P. O. BOX 2954
NEW YORK, N. Y. 10008

IN REPLY REFER TO
6N6A
Ap:NY:RJG:MS

JUN 30 1967

Mr. Herman Jaffe
360 Lexington Avenue
New York, New York 10017

Dear Mr. Jaffe:

Pursuant to the authority conferred upon you in a power of attorney on file with the Internal Revenue Service, there is transmitted herewith a copy of a letter with enclosures, mailed to the taxpayer whose name and address are given below.

Very truly yours,

Sheldon Lamet
Assistant Chief,
Appellate Branch Office

Enclosures:
Letter
Statement
Agreement form

Mr. Philip Handelman and
Mrs. Esther Handelman
5 Tudor City Place
New York, New York 10017

U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
OFFICE OF REGIONAL COMMISSIONER
NORTH ATLANTIC REGION
APPELLATE BRANCH OFFICE
P. O. BOX 2954
NEW YORK, N. Y. 10008

JUN 30 1967

IN REPLY REFER TO
Form L-21A

Ap:NY:PJS:NS

Mr. Philip Mandelman and
Mrs. Esther Mandelman
5 Tudor City Place
New York, New York 10017

TAXABLE YEAR ENDED	DEFICIENCY
December 31, 1961	
Tax	$ 5,654.87
Negligence Penalty	
Section 6653(a)	282.74
December 31, 1962	$37,192.35
December 31, 1963	$42,240.33
December 31, 1964	$ 1,508.03
December 31, 1965	$ 2,758.76

Dear Mr. & Mrs. Mandelman:

In accordance with the provisions of existing internal revenue laws, notice is given that the determination of your income tax liability discloses a deficiency or deficiencies in the amounts and for the taxable years shown above. The enclosed statement shows the computation of the deficiency or deficiencies.

If you do not intend to contest this determination in the Tax Court of the United States, please sign the enclosed Waiver, Form 870, and return it promptly in the enclosed envelope. This will permit early assessment of the deficiency or deficiencies and limit accumulation of interest.

If you do not sign and return the Waiver, the deficiency or deficiencies will be assessed for collection, as required by law, upon the expiration of 90 days (15) days if you are outside the States of the Union and the District of Columbia) from the date of this letter, unless within that time you contest this determination in the Tax Court of the United States by filing a petition with that Court in accordance with its rules. A copy of the rules of the Court may be obtained by writing to the Clerk, Tax Court of the United States, Box 70, Washington, D. C. 20044.

Very truly yours,

SHELDON S. COHEN

Commissioner

By

(Signed) Theodore D. Bennett

Assistant Chief
Appellate Branch Office

Enclosures - 3:
Statement
Waiver, Form 870
Return envelope

FORM L-21A (REV. 12-65)

Ap:NY:HRG:MS

STATEMENT

Mr. Philip and Mrs. Esther Handelman
5 Tudor City Place
New York, New York 10017

INCOME TAX

Taxable Year Ended	Deficiency	Negligence Penalty Section 6653(a)
December 31, 1961	$ 5,664.37	$282.74
December 31, 1962	37,192.35	
December 31, 1963	42,249.33	
December 31, 1964	1,568.03	
December 31, 1965	2,768.73	
Totals	$89,443.35	$282.74

It has been determined that part of the deficiency is due to negligence. Consequently, the 5 per centum addition to the tax provided by section 6653(a) of the Internal Revenue Code of 1954 is asserted for the year 1961.

A copy of this letter and statement has been mailed to your representative, Mr. Herman Jaffe, 360 Lexington Avenue, New York, New York 10017, in accordance with the authority contained in the power of attorney executed by you.

Taxable Year Ended December 31, 1961

ADJUSTMENTS TO INCOME

Taxable income as disclosed by return		$ 4,947.15
Unallowable deductions and additional income:		
(a) Cross receipts	$ 2,611.00	
(b) Wages	955.76	
(c) Office-General	2,408.41	
(d) Commission Expense	2,777.00	
(e) Lost expense (Promotional expense)	3,526.56	
(f) Other promotion and entertainment	2,135.75	
(g) Depreciation	3,265.65	
(h) Rent	600.00	
(i) Medical	521.00	19,801.93
Taxable income as corrected		$23,749.08

Mr. Philip Mandelman and
Mrs. Esther Mandelman

[-2-]

Statement

Taxable Year Ended December 31, 1961

EXPLANATION OF ADJUSTMENTS

(a) It has been determined that the gross receipts from your profession have been understated in the amount of $2,011.00.

(b) The deduction of $9,140.76 claimed for wages has been disallowed in the amount of $955.76 because it has not been established that you are entitled to deduct this amount.

(c) The deduction of $8,267.84 claimed for office expense-general has been disallowed in the amount of $2,400.41 because it has not been established that you are entitled to deduct this amount.

(d) The deduction of $20,092.07 claimed for commissions (fees) to other lawyers has been disallowed in the amount of $2,777.00 because it has not been established that you are entitled to deduct this amount.

(e) The deduction of $3,857.00 attributable to boat expenses and claimed as promotional expense, has been disallowed in the amount of $3,526.56 because it has not been established that more than $330.44 constitutes ordinary and necessary business expense, as follows:

Total boat expenses incurred	$4,821.74
Less: Cost of sails capitalized	3,500.00
Net expenses	$1,321.74
25% business use allowed	$ 330.44

(f) The deduction of $4,271.50 claimed for other promotional and entertainment expense has been disallowed in the amount of $2,135.75 because it has not been established that this amount constitutes ordinary and necessary business expense.

(g) It has been determined that depreciation on your boat is allowable as a business deduction in the amount of $734.35 in lieu of $4,000.00 claimed.

Adjusted basis of boat	$20,000.00
Plus capitalized sails	3,500.00
Total	$23,500.00
Depreciation over remaining life (8 years)	$ 2,937.50
25% business use	$ 734.35

[-3-]

Mr. Philip Handelman and
Mrs. Esther Handelman

Statement

Taxable Year Ended December 31, 1961

EXPLANATION OF ADJUSTMENTS (Cont'd)

(h) The deduction of $3,000.69 claimed for rent has been disallowed in the amount of $600.00 because it has not been established that you are entitled to deduct more than $600.00 of $1,200.00 claimed for the use of your apartment for business purposes.

(i) It has been determined that due to the increase in the amount of your adjusted gross income a medical deduction of $1,792.34 is allowable in lieu of $2,313.33 claimed.

COMPUTATION OF INCOME TAX

Taxable income as corrected		$23,749.08
Combined normal tax and surtax - joint return		$ 6,704.65
Less: Dividends received credit		41.41
Income tax		$ 6,663.24
Add: Self-employment tax		216.00
Income tax liability as corrected		$ 6,879.24
Income tax liability disclosed by return		1,224.37
Deficiency		$ 5,654.87
Negligence penalty - Section 6653(a)		$ 282.74

Taxable Year Ended December 31, 1962

ADJUSTMENTS TO INCOME

Adjusted gross income as disclosed by return		$ 3,366.08
Unallowable deductions and additional income:		
(a) Other income	$70,000.00	
(b) Promotion & entertainment	5,686.54	
(c) Office expense	1,200.00	76,886.54
Total		$80,252.62
Nontaxable income and additional deductions:		
(d) Standard deduction	$ 1,000.00	
(e) Exemptions	2,400.00	
(f) Dividends	100.00	3,500.00
Taxable income as corrected		$76,752.62

[-4-]

Mr. Philip Mandelman and
Mrs. Esther Mandelman

Statement

Taxable Year Ended December 31, 1962

EXPLANATION OF ADJUSTMENTS

(a) It has been determined that the sum of $70,000.00 received by you in the year 1962 in connection with a contract to sell certain shares of Graphic Arts Exhibit Building, Inc. is taxable as ordinary income. Since you failed to report such income in your return filed, your taxable income is increased by $70,000.00.

(b) The deduction of $11,425.16 claimed for promotion and entertaining expenses has been disallowed in the amount of $5,633.54 because it has not been established that $4,793.92 boat expenses and $839.62 of other entertainment expenses constitute ordinary and necessary business expenses.

(c) The deduction of $3,850.00 petty cash office expenses is disallowed to the extent of $1,200.00 because it has not been established that the amount in excess of $2,650.00 constitutes an ordinary and necessary business expense or was expended for the purpose designated.

(d) It has been determined that a standard deduction of $1,000.00 is allowable as provided by section 141 of the Internal Revenue Code of 1954.

(e) It has been determined that you are entitled to a deduction of $2,400.00 for personal exemptions as provided by section 151 of the Internal Revenue Code of 1954.

(f) To allow a dividend exclusion of $100.00.

COMPUTATION OF INCOME TAX

Taxable income as corrected	$76.752.62
Combined normal tax and surtax - joint return	$37,239.31
Less: Dividends received credit (4% of $1,277.59)	51.10
Income tax	$37,188.21
Add: Self-employment tax (4.7% of $4,800.00)	225.60
Income tax liability as corrected	$37,413.81
Income tax liability disclosed by return	221.46
Deficiency	$37,192.35

[-5-]

Mr. Philip Mandelman and
Mrs. Esther Mandelman — Statement

Taxable Year Ended December 31, 1963

ADJUSTMENTS TO INCOME

Taxable income (loss) as disclosed by return		($11,848.50)
Unallowable deductions and additional income:		
(a) Other income	$95,000.00	
(b) Promotional	11,191.09	
(c) Medical deduction	1,031.89	107,222.98
Total		$ 95,374.48
Nontaxable income and additional deductions:		
(d) Capital gains & losses		11,341.11
Taxable income as corrected		$ 84,033.37

EXPLANATION OF ADJUSTMENTS

(a) It has been determined that the sum of $95,000.00 is taxable as ordinary income in the year 1963 when a contract to sell certain shares of Graphic Arts Exhibit Building, Inc. stock was held to be in final default. Since you failed to report such income in your return filed, your taxable income is increased by $95,000.00. See partial offsetting capital gain adjustment (d).

(b) The deduction of $14,410.09 promotional expenses is disallowed in the amount of $11,191.09 because it has not been established that boat expenses claimed in the amount of $9,107.25 and other promotional expenses totalling $2,083.84 qualify as deductible business expenses under sections 274 and 162 of the Internal Revenue Code of 1954.

(c) It has been determined that due to the increase in the amount of your adjusted gross income the medical deduction claimed in the amount of $1,031.89 is not deductible.

(d) As it has been determined that the amount received in connection with a contract to sell certain shares of Graphic Arts Exhibit Building, Inc. stock is ordinary income, the long-term capital gain of $29,370.00 reported on the installment basis is eliminated. Consequently, you are entitled to deduct a capital loss of $1,000.00 instead of a reported net gain of $10,341.11.

[-6-]

Mr. Philip Mandelman and
Mrs. Esther Mandelman — Statement

Taxable Year Ended December 31, 1963

COMPUTATION OF INCOME TAX

Taxable income as corrected	$84,033.37
Combined normal tax and surtax - joint return	$42,263.03
Less: Dividends received credit	13.70
Income tax	$42,249.33
Add: Self employment tax	-
Income tax liability as corrected	$42,249.33
Income tax liability disclosed by return	None
Deficiency	$42,249.33

Taxable Year Ended December 31, 1964

ADJUSTMENTS TO INCOME

Taxable income (loss) as disclosed by return		$(731.95)
Unallowable deductions and additional income:		
(a) Promotion & entertainment	$7,793.68	
(b) Office general	1,200.00	8,993.68
Total		$ 8,261.73
Nontaxable income and additional deductions:		
(c) Medical deduction		394.30
Taxable income as corrected		$ 7,867.43

EXPLANATION OF ADJUSTMENTS

(a) The deduction of $11,416.70 claimed for promotion and entertainment expenses has been disallowed in the amount of $7,793.68 because it has not been established that you are entitled to deduct $500.00 cash expenses, $443.81 gifts and $6,849.87 boat expenses under sections 162 and 274 of the Internal Revenue Code of 1954.

(b) The deduction of $5,275.00 petty cash office expenses is disallowed to the extent of $1,200.00 because it has not been established that the amount in excess of $4,075.00 constitutes an ordinary and necessary business expense or was expended for the purpose designated.

(c) It has been determined that due to error on the return and the increase in the amount of your adjusted gross income, a medical deduction of $1,178.99 is allowable in lieu of $784.69 claimed.

[-7-]

Mr. Philip Handelman and
Mrs. Esther Handelman — Statement

Taxable Year Ended December 31, 1964

COMPUTATION OF INCOME TAX

Taxable income as corrected		$ 7,867.43
Combined normal tax and surtax - joint return		$ 1,453.49
Less: Dividends received credit (2% of $769.00)		15.38
Income tax		$ 1,438.11
Add: Self-employment tax (5.4% of $4,800.00)		259.20
Income tax liability as corrected		$ 1,697.31
Income tax liability disclosed by return		109.28
Deficiency		$ 1,588.03

Taxable Year Ended December 31, 1965

ADJUSTMENTS TO INCOME

Taxable income as disclosed by amended return		$ 3,911.84
Unallowable deductions and additional income:		
(a) Promotion and entertainment	$12,255.00	
(b) Medical expense	367.46	12,622.54
Taxable income as corrected		$16,535.38

EXPLANATION OF ADJUSTMENTS

(a) The deduction of $12,622.00 claimed for promotion and entertainment expenses has been disallowed in the amount of $12,255.00 because it has not been established that you are entitled to deduct such expenses of this amount under sections 162 and 274 of the Internal Revenue Code of 1954.

(b) It has been determined that due to the increase in the amount of your adjusted gross income a medical deduction of $209.67 is allowable in lieu of $576.33 claimed.

[-8-]

Mr. Philip Mandelman and
Mrs. Esther Mandelman

Statement

Taxable Year Ended December 31, 1965

COMPUTATION OF INCOME TAX

Taxable income as corrected	$16,535.38
Combined normal tax and surtax - joint return	$ 3,409.91
Income tax	$ 3,409.91
Add: Self-employment tax	259.20
Income tax liability as corrected	$ 3,669.11
Income tax liability disclosed by original return	910.33
Deficiency	$ 2,758.78

Ap:NY:RJG:MS

Mr. Philip Handelman and
Mrs. Esther Handelman

FORM 870 (REV. FEB. 1965)	U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE WAIVER OF RESTRICTIONS ON ASSESSMENT AND COLLECTION OF DEFICIENCY IN TAX AND ACCEPTANCE OF OVERASSESSMENT	DATE RECEIVED BY INTERNAL REVENUE SERVICE

Pursuant to section 6213(a) of the Internal Revenue Code of 1954 or corresponding provisions of prior internal revenue laws, the restrictions provided in section 6213(a) or corresponding provisions of prior internal revenue laws are hereby waived and consent is given to the assessment and collection of the following deficiencies, together with interest on the tax as provided by law; and the following overassessments are accepted as correct:

DEFICIENCIES Section 6653(a)

TAXABLE YEAR	TYPE OF TAX	AMOUNT OF TAX	PENALTY	
December 31, 1961	Income	$5,654.87	$282.74	
December 31, 1962	Income	$37,192.35		
December 31, 1963	Income	$42,249.33		
December 31, 1964	Income	$ 1,588.03		

OVERASSESSMENTS

TAXABLE YEAR	TYPE OF TAX	AMOUNT OF TAX	PENALTY	
December 31, 1965	Income	$ 2,758.78		

NAME AND ADDRESS OF TAXPAYER(S) *(Number, street, city or town, State, ZIP code)*

Corporate Seal

SIGNATURE		DATE
SIGNATURE		DATE
SIGNATURE	TITLE	DATE

NOTE: The execution and filing of this waiver will expedite adjustment of the tax liability as indicated above. It is not, however, a final closing agreement under section 7121 of the Internal Revenue Code and does not preclude assertion of a further deficiency in the manner provided by law if it is later determined that additional tax is due; nor does it extend the statutory period of limitation for refund, assessment, or collection of the tax.

If the waiver is executed for a year for which a JOINT RETURN OF A HUSBAND AND WIFE was filed, it must be signed by both husband and wife unless one, acting under a power of attorney, signs as agent for the other.

If the taxpayer is a corporation, the waiver must be signed with the corporate name followed by the signature and title of the officer(s) duly authorized to sign. It is not necessary that the corporate seal be affixed. The space provided for the seal is for the convenience of corporations required by charter or by the laws of the jurisdiction in which they are incorporated to affix their corporate seals in the execution of instruments.

The waiver may be executed by the taxpayer's attorney or agent provided such action is specifically authorized by a power of attorney which, if not previously filed, must accompany the form.

If the waiver is executed by a person acting in a fiduciary capacity (such as executor, administrator, trustee, etc.), Form 56, "Notice of Fiduciary Relationship," should, unless previously filed, accompany this form

Form 870 (Rev. 2-65)

UNITED STATES TAX COURT

PHILIP HANDELMAN,	:	
	:	
Petitioner,	:	
	:	Docket Number:
vs.	:	
	:	4913-67
COMMISSIONER OF INTERNAL REVENUE,	:	
	:	
Respondent.	:	

FEderal Court
Room 206
26 Federal Plaza
New York, New York

Tuesday, 25 January 1972

Met, pursuant to Notice, at 10:00 a.m.

BEFORE:

HONORABLE WILLIAM QUEALY, Judge.

APPEARANCES:

MR. HERMAN JAFFE,
For the Petitioner.

MRS. MARION L. WESTEN,
For the Respondent.

C O N T E N T S

WITNESSES:

	DIRECT	CROSS
PHILIP MANDELMAN	33/66	
ROBERT M. TRIEN	57	61
RENE M. CORBET	62	
JOSEPHINE ADKIN	72	

EXHIBITS

	FOR IDENTIFICATION	IN EVIDENCE
Joint Exhibit 1-I		5
Joint Exhibit 15-O		20
Joint Exhibit 16-P		20
Petitioner's Exhibit 18, 19, 20, 21	27	
Petitioner's Exhibit 22, 23	34	
Joint Exhibit 24	40	
Joint Exhibit 25	40	
Joint Exhibit 26	41	
Petitioner's Exhibit 27	49	57
Petitioner's Exhibit 28	74	75
Petitioner's Exhibit 29	75	77
Petitioner's Exhibit 30	76	77
Petitioner's Exhibit 31	76	77
Petitioner's Exhibit 32	76	77

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THE CLERK: Docket number 4913-67, Philip Handelman.

MR. JAFFE: Herman Jaffe for the Petitioner.

MRS. WESTEN: Marion L. Westen for the Respondent. At this time before we commence the proceeding may we request our subpoena to Mr. Philip Handelman be enforced, the records which we requested in that subpoena be made available to the Respondent for examination.

THE COURT: Do you know anything about the subpoena, Mr. Jaffe?

MR. JAFFE: Yes, I do. Mr. Handelman was served with a subpoena and he has most of the records except those records that weren't available to him that had been turned over to an attorney at the time of the settlement of the first part of this action on the note and the attorney now claims that he no longer has them. Miss Westen, Mr. Handelman's returns were examined. Isn't that right?

MISS WESTEN: Yes.

THE COURT: The Respondent made a determination here?

MRS. WESTEN: Yes.

THE COURT: The burden is on the Petitioner

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to show that determination is incorrect. Is that correct?

MRS. WESTEN: Yes.

THE COURT: Then for what purpose were the records subpoenaed in the first instance?

MRS. WESTEN: For the purpose of cross examination.

THE COURT: I see. Maybe Mr. Handelman won't testify.

MR. HANDELMAN: Good idea, your Honor.

THE COURT: The parties have a stipulation here?

MRS. WESTEN: No.

MR. JAFFE: No, we have not.

THE COURT: Why not?

MRS. WESTEN: Because, your Honor, the Respondnnt received a stipulation from the Petitioner's representative which was unacceptable to the Respondent, and we submitted two proposed stipulations to the Petitioner's representative who have not come in and sit down and negotiate with Respondent to date.

THE COURT: Let's not--

MR. JAFFE: May I correct the statement. Eighty days before the case was supposed to come up on

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this calendar I submitted a stipulation that had been agreed upon by the proper attorney, Mr. John Murray. We were supposed to go to trial. At that time we agreed upon a stipulation and I had submitted a similar stipulation about eighty days ago. About ten days ago I had no answer to my stipulation, no signature or anything. About ten days ago through certified mail I received a set of stipulations from Mrs. Westen, and I called her and told her that they were unacceptable because they had mentioned certain exhibits which did not-- which were not part of the stipulations as I received them.

MRS. WESTEN: Your Honor, may I correct this statement of Petitioner's counsel. The first proposed stipulation by the Respondent was submitted to the Petitioner's Counsel in December at which time--

THE COURT: First, let's get back to the stipulation Mr. Murray agreed upon. Counselor, do we have a copy of that stipulation?

MRS. WESTEN: I am sure I do, your Honor.

THE COURT: Let's have it here as a joint exhibit.

MRS. WESTEN: I need the copy, your Honor, to read it in order to know what my objection might be.

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THE COURT: I intend to make it a part of the record and you will have access to it at that time.

MRS. WESTEN: All right.

THE CLERK: For identification Joint Exhibit 1-1.

THE COURT: Let me see the stipulation. Now, do we have the exhibits that go with this?

MRS. WESTEN: I believe so, your Honor.

THE COURT: Let's have the exhibits also.

Was the stipulation agreed to by you with Mr. Murray?

MR. JAFFE: Yes, we did agree to it.

MRS. WESTEN: This may not be all the exhibits. These are the returns, and I may have put the others out of order.

THE COURT: We will take a recess here in a little while and look through the rest of the exhibits. Now, Mrs. Westen, is there anything in the stipulation which you are prepared to show is incorrect?

MRS. WESTEN: Oh, I would like to read it so I may go through it paragraph by paragraph with your Honor. Yes, there is information that has come to our attention since that stipulation was executed which changes the complexion of this case.

O.S.T.R., Inc.

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THE COURT: In other words, you want additional matters stipulated?

MRS. WESTEN Well, I want additional matters stipulated and I want to qualify the language used in that stipulation.

THE COURT: Paragraph 1 of the stipulation-- don't you have any more copies of this? Do you have a copy, Mr. Jaffe?

MR. JAFFE: I don't have it here because we hadn't-- the time I saw Mrs. Westen she didn't want to go ahead with this thing.

THE COURT: Petitioners Philip Handelman and Esther Handelman are husband and wife, et cetera, et cetera. You don't disagree with that?

MRS. WESTEN: No.

THE COURT: Paragraph two, Petitioner hereinafter sometimes referred to individually as the Petitioner is an attorney at law.

MRS. WESTEN: Well, I would want to know what the whole paragraph says.

THE COURT: Licensed to practice in the State of New York.

MRS. WESTEN: If that is the entire paragraph I have no objection.

THE COURT: Paragraph three sets forth the

date of the filing of the returns and Respondent's exhibits A to E inclusive.

MRS. WESTEN: No objection.

THE COURT: A retained copy of the Petitioner's 1964 income tax return is attached hereto as Respondent's exhibit 6F.

MRS. WESTEN: No objection.

THE COURT: During the years in question the Petitioners filed their joint United States income tax returns on a calendar basis and on a cash basis.

MRS. WESTEN: No objection.

THE COURT: Paragraph six, the joint return they reported on the installment basis $29,370 as long-term capital gain received from their alleged sale of stocks of Graphic Arts Exhibit Building Incorporated hereinafter sometimes referred to as Graphic Arts per the schedule attached to their return. This stock was purportedly sold on August 30th, 1961 for $245,000.

MRS. WESTEN: Well--

THE COURT: Did they report that amount on their return?

MRS. WESTEN: They reported that amount.

THE COURT: As capital gain?

MRS. WESTEN: Yes, as capital gain.

THE COURT: You agree with that?

MRS. WESTEN: They--

THE COURT: This stock was purportedly sold on August 30th, 1961 for $245,000?

MRS. WESTEN: That the Respondent has no knowledge of, your Honor.

THE COURT: This doesn't say it was. It says I assume that's the date shown on the return that's the date.

MRS. WESTEN: Well, it strikes the Respondent's counsel, your Honor, that it's meaningless to stipulate to something which is merely purported.

THE COURT: We don't know whether that is true or false.

MRS. WESTEN: Right.

THE COURT: The stipulation permits you to prove it is true or false.

Paragraph seven in connection with the purported sale of Graphic Arts stock-- does the Respondent contest the fact the Petitioner sold these stocks?

MRS. WESTEN: Yes. The Respondent does question that.

THE COURT: All right. Okay. On or about

August 30th, 1961. In connection with the Petitioner's claim or the Petitioner's position that the sale of the stock took place on August 30th, 1961, the sum of $25,000 which sum was included in the $66,794 of the total receipts as reported by the Petitioner in schedule C of the 1961 United States income tax return. It states the Petitioner received $25,000 on or about August 30th, 1961.

MRS. WESTEN: The Respondent objects to the characterization in that stipulation, your Honor. The Respondent does not object--

THE COURT: In other words, in connection with the transaction involving the stock?

MRS. WESTEN: Yes.

THE COURT: That's all this says.

Paragraph eight, we have a copy of the summons and complaint.

MRS. WESTEN: Respondent objects to that one on the grounds it is first of all incompetent hearsay for one thing and it is misleading because it is incomplete.

THE COURT: Well, that doesn't go to this objection. Now, do you have any objection to the relevancy, materiality and so forth?

MRS. WESTEN: Those are the ones we reserve.

We waive our objection to competency.

THE COURT: This doesn't say it is complete. It only stipulates it's a summons and complaint.

MRS. WESTEN: Then it goes in for what it is worth.

THE COURT: That is all the stipulation.

MRS. WESTEN: We wish to retain our objection to the competency of the document.

THE COURT: You may retain any objection you wish but you agree this is a summons and complaint in this case. Right?

MRS. WESTEN: We will agree it is a summons and complaint. I reserve the right to object both to materiality and relevancy and competency.

THE COURT: What do you mean by competency?

MRS. WESTEN: The competency of this hearsay document to go in as truth of the statement.

THE COURT: The summons and complaint doesn't prove the statements made in that complaint are necessarily true. All the summons and complaint does is show that as of the time that was filed somebody filed-- the Petitioner filed a suit against these parties and this is what the Petitioner alleges. That is what is being offered for. Is that right?

MR. JAFFE: Yes.

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THE COURT: So paragraph eight is all right.

Paragraph nine, answer and amended answer in that proceeding. We got copies of the official documents. I would like to remind Mrs. Westen I had a gentleman from this Court I assume deliver a whole file including briefs over here.

MRS. WESTEN: Yes.

THE COURT: I questioned the materiality of it, but anyway these are correct copies so you don't question that?

MRS. WESTEN: No. On the grounds of completeness we ask the entire file be subpoenaed.

THE COURT: This question is to whether or not this is complete, you can offer anything you want to show that it isn't , doesn't tell the whole story or you can ask the Petitioner but there is nothing wrong with paragraph eight and nine of the stipulation. Is there?

MRS. WESTEN: No.

THE COURT: Paragraph ten, final judgment. Is there anything wrong with that?

MRS. WESTEN: We would ask that the order be added to it.

THE COURT: Final judgment and order. All right. The parties want to submit a copy of the

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order, why it will be received as the next numbered exhibit F in the stipulation.

Paragraph eleven, general release and stipulation involving a disposition of the proceedings. Is there any question about that being what it purports to be?

MRS. WESTEN: No.

THE COURT: Paragraph twelve, on May 8th, 1970 the Petitioner received the sum of $89,500 in consideration of his execution of the stipulation and general release referred to in paragraph eleven above. Is that true?

MRS. WESTEN: Respondent has no knowledge of what Petitioner received on that date.

THE COURT: Well, how did this get in the stipulation then if you have no knowledge?

MRS. WESTEN: Well, there is an agreement and release and recites this was in fact in consideration of the sum of $89,500, but I haven't seen any check with that amount or establishing the date.

THE COURT: I ask the Repondent again how or why this got into a stipulation which obviously was prepared by counsel for the Respondent?

MRS. WESTEN: Respondent's present counsel

has no knowledge of that.

THE COURT: The former counsel must have or wouldn't have stipulated to it.

MR. JAFFE: The Respondent's counsel had seen all of that information; otherwise, it couldn't have been stipulated to.

THE COURT: That is what the Court would assume.

Paragraph thirteen, joint exhibits 12L and 13M, stock certificates of Graphic Arts that were issued to the Petitioner on June 13th, 1962 covering thirty-nine and twenty-five shares of its stock.

MRS. WESTEN: That purports to stipulate to the copies of stock certificates. Respondent's counsel has not seen the original stock and requests that be produced.

THE COURT: Well, the Court would point out at some time Mr. Murray must have seen them.

MRS. WESTEN: Our files do not indicate such is the case.

THE COUNT: Do we have the originals?

MR. JAFFE: No, we turned them over at the time the judgement was settled.

MRS. WESTEN: In connection with that I have a letter from the attorney who represented Mrs.

A.B.A. Reporters, Inc.

Van De Maele at the time the judgment was settled indicating that payment was made to him and he did deliver certain certificates of stock which I did transmit to you. Recently, Mr. Handelman requested me to make a search of our records to determine whether we had the corporate outfit or any books and records of Graphic Arts, Inc. We made a search of our books and records to accommodate him and reported to him that we did not have the books, records or corporate outfit of Graphic Arts, Inc. We have no letter of transmittal of any documents to us or any entry of having received such books, records or corporate outfit.

I hope this information is adequate for your purposes.

THE COURT: May I see that letter?

MRS. WESTEN: Yes.

THE COURT: Who is Mr. Wagman?

MRS. WESTEN: Mrs. Van De Maele's tax attorney.

THE COURT: Now, who is Mr. Jesse Cohen?

MRS. WESTEN: Jesse Cohen represented Mrs. Van De Maele in the litigation.

THE COURT: It is stated in this letter which counsel for the respondent has in her possession

that at the time of the settlement Mr. Handelman turned over certain stock certificates. Isn't that correct?

MRS. WESTEN: Well, your Honor, the settlement was in 1970 and the corporation was dissolved in 1965. The Respondent finds it difficult to see how stock certificates of the corporation could have been turned over in 1970.

THE COURT: Well, the certificates--

MRS. WESTEN: They are pieces of paper.

THE COURT: That may be but they are still, whether they are defunct or what have you, they are still stock certificates. Isn't that right? They are the certificates which represented the stock of the corporation which was formerly in being. Isn't that right?

MRS. WESTEN: It seems, your Honor, we ought to have the right to examine the stock book.

THE COURT: If we can find the stock book, that will be fine. The Court fails to see why counsel for the Respondent objects to paragraph thirteen after the Respondent's prior counsel once agreed to it and it appears certificates were in fact delivered at the time and counsel for the Respondent is confirming this through unrelated sources

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Isn't that right?

MRS. WESTEN: Well, yes, but through Mrs. Van De Maele's representative and through the same counsel to whom Petitioner's counsel applied for the records.

THE COURT: All right. We will let paragraph thirteen stand. We can't produce the originals. We produce copies. They are admissible anyway. Aren't they?

MRS. WESTEN: At this time I object to the characterization of the pieces of paper that were turned over in 1970 as stock certificates.

THE COURT: This doesn't characterize them as stock certificates in 1970. This says this was stock certificates issued on June 13th, 1962, that they were stock certificates at that time. Isn't that right?

MRS. WESTEN: In '62 they may have been stock certificates.

THE COURT: All right. Paragraph thirteen stands.

Paragraph fourteen says that the Petitioners purchased the Chee Chee V, he is a member of several yachting clubs and associations and claims business deductions on account of boat expenses, and the

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Respondent disallowed certain amounts. Now, is there any objection on that?

MRS. WESTEN: No. With respect to the remainder of that stipulation, your Honor, the REspondent has no objection.

THE COURT: No objection. Then this stipulation will be received in evidence along with the exhibits attached thereto. We will recess for about ten minutes to give the parties a chance to get those exhibits together.

MRS. WESTEN: May we request there be a supplemental stipulation at this time?

THE COURT: If you have one that you and Mr. Jaffe agree upon at some time I will be glad to take it up when we come back. We will now recess until ten-thirty and get the stipulation straightened out.

(There is a ten-minute recess.)

THE COURT: Now, I believe we have most of the exhibits referred to in the draft of the stipulation which in order not to confuse with the exhibits attached to the stipulation we will treat the stipulation of facts as a stipulation rather than as an exhibit, then we have the exhibit numbers as set forth in that stipulation, in that stipulation of facts, we will conform the copies that have been

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submitted to those exhibit numbers that in effect now we have stipulation of facts number one and exhibits which on the basis of the prior agreement by the patties and a failure on the part of the Respondent's counsel to indicate that there is any incorrect or misstated or otherwise faulty with the stipulation, and it will be received.

Now, Mrs. Westen, I understand you have a stipulation that you want to propose as an addendum to this?

MRS. WESTEN: There is only one item to which Petitioner's counsel was willing to stipulate, your Honor.

THE COURT: The Court isn't asking about that. The Court is asking what you have, that which you propose.

MRS. WESTEN: Yes, I do have additional matters to stipulate. We wish to stipulate, your Honor, to the certificate of dissolution of the corporation. I have a certified copy here of the dissolution papers showing the non-payment of taxes and its tax status.

THE COURT: Does Counsel for the Petitioner have any objection to this?

MR. JAFFE: I object to it on the grounds it

was filed long after the sale, that at the time the sale was made the corporation was good and in existence.

THE COURT: YOu object to the relevancy and the materiality?

MR. JAFFE: Yes.

THE COURT: Not on the authenticity. Subject to that objection it will be received as exhibit 15O.

MRS. WESTEN: Excuse me, your Honor, we inserted the Order when we stipulated before so I think it will be 16P, the order and final judgment.

THE COURT: We haven't received it yet.

MRS. WESTEN: I put that in. That's included in the thing I gave you.

THE COURT: Is tnat included in the stipulation?

MRS. WESTEN: Yes, It's included in the original stipulation because you said we'll include both of them.

THE COURT: We will include that when it is offered. No, we are going to stick with the numbers in the original stipulation for the exhibits that were attached to it, and that will cause the least amount of confusion. Everything that is in the stipulation is being admitted. It will be numbered in

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accordance with the stipulation. Now 150 will be this dissolution paper. That will be received as Joint Exhibit 150.

Now, Mrs. Westen, you have the order that you want to offer?

MRS. WESTEN: Well, I believe Alex has that.

THE COURT: Is that attached here?

MRS. WESTEN: Yes, the order and final judgment in the list of exhibits that you have already.

THE COURT: Final judgment. All right.

MRS. WESTEN: If there is no order here I will make a copy.

THE COURT: All right. When you make such a copy it will be duly received.

What else do you have?

MRS. WESTEN: I have a check of the Chemical Bank New York Trust Company dated March 26, 1962 in the amount of $40,000 which is endorsed by Mr. Handelman, a copy of a check.

THE COURT: Do you have any objection to this?

MR. JAFFE: No objection. It was on the tax return.

THE COURT: That will be 16P.

THE CLERK: Joint Exhibit 150 and 16P.

MRS. WESTEN: I have a copy of a credit advice for deposit of the account to E. M. Handelman dated February 20, 1962 in the amount of $30,000.

THE COURT: Credit advice of the Chemical Bank New York Trust.

MR. JAFFE: Made out to E. M. Handelman. I know nothing about it. It may have been an exchange check. All checks were made out to Philip Handelman in the past. I see no reason for a credit advice. Who got the money I don't know.

MRS. WESTEN: You will notice that the name of the Petitioner's wife is Esther M. Handelman.

THE COURT: It will be received as a credit advice. As to whether or not it has any relationship to this case, it will be up to the Respondent to establish. This isn't an item in the ninety-day let

MRS. WESTEN: Well, it is, your Honor, beca that $70,000, it's 40 and 30.

THE COURT: Where does it appear?

MRS. WESTEN: Well, we asserted an alternati position because we didn't know the years in which th amounts were received.

THE COURT: Give me the page and the line number of the ninety-day letter.

MRS. WESTEN: The adjustment is $70,000 in

1962 and $95,000 in 1963.

THE COURT: This check is in 1962.

MRS. WESTEN: Yes, and we made an adjustment of $70,000 consisting of 40 and 30.

THE COURT: Is this the check upon which you predicate $30,000?

MRS. WESTEN: We have an affidavit that was submitted in these proceedings across the street of Mrs. Van De Maele in which she alleges she paid $70,000 in 1962 and because of the inconsistency of the position in this affidavit with the position that the Petitioner was taking we made a protective adjustment to protect the government's interest. I have a copy of that affidavit.

THE COURT: How, Mrs. Westen, do you tie this in with this transaction.

MRS. WESTEN: Well, Mrs. Van De Maele in her other affidavit says she sent the money from that bank in Puerto Rico and you will see the credit is from the same bank. The credit to the account in New York represents the transfer of funds from the same bank and that's the basis.

THE COURT: It will be received 170 subject to the Petitioner's right to object as to relevancy, materiality as having anything to do with

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this.

MR. JAFFE: With respect to the order to protect the government's position, they reported $70,000 for the calendar year 1962 which is the 40 and 30 purportedly received. We claim that forty was received in 1962 and thirty in 1963, and then in order to protect the government's position she also claims that the total amount of $95,000 is treated as an additional income in 1963. On that basis you have $165,000 as reported income in the two years which is not proof.

THE COURT: I assume from what Mrs. Westen has said there are duplications here. Is that right?

MRS. WESTEN: Yes, that's right.

THE COURT: This is offered by Mrs. Westen as a basis upon which she is showing the $30,000 was received in '62 and not '63.

MRS. WESTEN: Yes.

THE COURT: You will tie this in with the tax, and I assume it will be relevant for that purpose?

MRS. WESTEN: I have another exhibit. This is the affidavit of Mrs. Van De Maele in which she states she advanced to Mr. Handelman in 1962 $70,000.

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THE COURT: $70,000?

MRS. WESTEN: This shows the state of mind, the intention of the party.

THE COURT: You will have to call this woman as a witness, Mrs. Westen. You can't admit her testimony by stipulation here.

MRS. WESTEN: Well, this comes in under the exception to hearsay rule with respect to the intention of the parties.

THE COURT: She is not a party to this proceeding. She is not a party.

MRS. WESTEN: But what is in issue is the intention of the parties with respect to the alleged agreement.

THE COURT: If she is going to testify she is going to testify. The Court won't receive an affidavit from somebody that is not a party. You may have your exception.

MRS. WESTEN: Thank you.

I think at this time, your HOnor, these are all the exhibits I have to offer.

THE COURT: Now, we have our stipulation of facts. Do you have an opening statement you want to make, Mr. Jaffe, if you still remember it?

MR. JAFFE: There are several issues involved.

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One is the contract of sale and the installment plan; second, is the fact that the Internal Revenue Agent erred in submitting several revenue agent reports purporting the same figures but different amounts.

THE COURT: We are in other words concerned about what the revenue agent-- well, let's start with the ninety-day letter. That has to be right or wrong. It doesn't make any difference how many mistakes were made on the way to get there.

MR. JAFFE: The ninety-day letter is wrong because of the fact that they treated $70,000 in '62 as income, they treated the $95,000 in '63 as income.

THE COURT: Let me interrupt.

MR. JAFFE: The total was only $95,000.

THE COURT: As I understand it counsel for the Respondent, she concedes that $30,000 of that amount shouldn't be in both years. Is that right?

MRS. WESTEN: That's correct.

THE COURT: We have to reduce one year or another by $30,000. Is that right?

MRS. WESTEN: Yes, your Honor.

THE COURT: We are getting places here.

MR. JAFFE: May I submit as exhibits revenue agents reports dated August 18th, 1964, June 2nd, 196

and June 30th, 1967.

THE COURT: For what purpose?

MR. JAFFE: The purpose of showing all of those items are entirely different than the ninety-day letter.

MRS. WESTEN: Objection.

THE COURT: Objection sustained.

MR. JAFFE: Could I have this for identification only?

THE COURT: Yes, you may have that marked for identification. Mrs. Westen were you going to say something?

MRS. WESTEN: The agent is not here. It should be identified by someone. There is no one here to identify them.

THE COURT: He is just marking them for identification. If your objection is based on the authenticity of them--

MRS. WESTEN: I have no knowledge.

THE COURT: --I will be glad to reconsider my ruling.

MRS. WESTEN: I haven't even seen what Mr. Jaffe just handed you.

THE COURT: I am sure there must be copies in your files.

THE CLERK: Petitioner's Exhibits 18, 19, 20 and 21.

MRS. WESTEN: If Mr. Jaffe is finished with his opening statement the Respondent would like to make an opening statement.

THE COURT: All right. Are you finished with your statement, Mr. Jaffé?

MR. JAFFE: Yes.

THE COURT: All right, Mrs. Westen.

MRS. WESTEN: May it please the Court this case involves the deficiencies in income taxes in the aggregate amount of $89,443.36 for the Petitioner's taxable years ended December 31, 1961 through December 31, 1965 inclusive, and in addition to tax pursuant to section 6653A of the Internal Revenue Code of 1954 in the amount of $282.74 for the Petitioner's 1962 taxable year. The principal adjustment relates to the timing and proper treatment as capital or ordinary of payment in the aggregate amount of $95,000 received by the Petitioner Philip Handelman from Joan Van De Maele. It is the Respondent's position that what we have here are a series of abortive unexecuted oral agreements which do not qualify for installment reports or per capital gain treatment under the 1954 Internal Revenue Code.

The Respondent contends in 1961 there existed no agreement between the parties on the terms and conditions first declared in the Petitioner's 1963 Federal Income Tax return, no sale or exchange of the common stock of a viable corporation ever occurred. According to a letter in the Respondent's file from the Petitioner's representative dated March 10th, 1966 the $245,000 price allegedly given as consideration for the stock of Graphic Arts Exhibit Building, Inc. was composed of the following:

Cash payments allegedly received during the years 1961 through 1963 and in the aggregate amount of $95,000, adjustmentsin the amount of $126,000 and the amount of $24,000 which was then in 1966 at the time the letter was written still in litigation, and an order granting a partial summary judgment was obtained by Mr. Handelman against Mrs. VAn De Maele in connection with litigation commenced by him in 1963 on certain defaulted promissory notes which had been executed by Mrs. Van De Maele or Mr. Thomas O'Conner who was Mrs. Van De Maele's partner in the Graphic Arts deal.

In his complaint filed in that action the Petitioner here alleged that on or about March 1st, 1963 the defendants, that is Mrs. Van De Maele and Mr.

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O'Conner, agreed to pay the plaintiff the sum of $24,000 in consideration of the plaintiffs granting them an extension of time to pay the notes on which the action was based. This argument was renewed in the Petitioner's brief in support of his motion to strike the defenses and for summary judgement. Moreover, in his affirmation in support of his motion for summary judgment the Petitioner asserted that five days after the defendants defaulted on payment of two notes, the December, 1961 note they executed and delivered to the plaintiff a third note in the amount of $59,000. That note was by its terms due on September 14th, 1963 it says in the motion and was not paid.

In an affidavit in opposition to the plaintiff's motion for summary judgment Mrs. VAn De Maele alleges she owed Mr. Handelman nothing on the notes involved in the suit as she already paid him more than their face amount including $25,000 in 1961 and an additional $70,000 in February, in February and March, 1962 to redeem his yacht from a judgment lien and to provide additional collateral for his margin account. These are the cash amounts in issue in this case.

In support of the motion for summary judgment

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Mr. Handelman asserted that the parole evidence rule precluded the introduction of evidence of alleged oral agreements to vary the expressed terms of the written note. On December 7th, 1965 the Supreme Court of New York County entered its Order granting the Plaintiff, the Petitioner here, a partial summary judgment on the notes involved in litigation on the basis of the parole evidence rule but severed and continued the action with respect to the additional $24,000 alleged to be due.

On January 27, 1966 a judgment was entered against Mr. O'Conner on the notes but the Court withheld the judgment against Mrs. Van De Maele pending final determination of the issue raised by her affidavit in opposition to the motion for summary judgment. The litigation against Mrs. Van De Maele was finally discontinued by agreement between the parties in 1970 at which time Mr. Handelman purported to transfer certain pieces of paper allegedly representing stock in Graphic Arts Exhibit Building to Mrs. Van De Maele or her representative, only Graphic Arts Building had been dissolved in 1965 by proclamation for non-payment of taxes since its initial year which was 1961.

It is the Respondent's position that the

purported transfer of the stock in a non-existing corporation is a nullity and there was no sale or exchange of property which could qualify for capital treatment under the Internal Revenue Code of 1965. Moreover, the Respondent asserts from the pleadings, affidavit and exhibits filed in the New York County Supreme Court and from the Petitioner's own admissions in that suit which are inconcistent with his allegations here that in 1961 there existed no agreement between the parties oral or otherwise on terms and conditions which were set forth in the Petitioner's 1963 Federal Income Tax REturn or which could form the basis for installment reporting, and finally, Respondent asserts that oral agreement not to be performed within one year which was in fact not performed is void under the statute of fraud and with respect to the $70,000--

THE COURT: It's not void. It's voidable by the parties. It has to be the parties. Is that your understanding? It has to be the parties?

MR. HANDELMAN: That's right. It's established by the fact we obtained the summary judgment and Federal judgment.

MRS. WESTEN: The judgment was based on the promissory note.

THE COURT: All right. I don't believe the concept of law. I don't believe it is correct.

MRS. WESTEN: You have to distinguish between executor and--

THE COURT: You weren't talking about that. You were talking about a contract between two private individuals. I don't think it requires this procedure.

MRS. WESTEN: With respect to the $70,000 of the amount received by Mr. Handelman from Mrs. Van De Maele there is also a question of timing and with respect to any amount was included in income during 1962. With respect to the disallowance of the deductions for expenses, the Respondent has determined that these to the extent disallowed were neither ordinary and necessary nor adequately substantiated with respect to pre-274 years 1962 and 1964 and earlier and transition period had allowed the petitioner twenty-five per cent of the amount claimed on the basis of a prior decision of this Coutt relating to the same issue for an earlier year and were close to post 274 years which had disallowed deductions for failure to meet the requirements of that provision of the Code.

Thank you.

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THE COURT: Do you want to call your first witness?

MR. JAFFE: Yes.

P H I L I P H A N D E L M A N, 5 Tudor City Place, New York City, New York, sworn.

DIRECT EXAMINATION BY MR. JAFFE:

Q. To save the Court's time I would like to have Mr. Handelman recite the details of the Graphic Arts transaction, how it came about and how it also came about Mr. O'Conner came into the building and into the proposition.

MRS. WESTEN: Your Honor, at this time we would like to specifically request the Court to limit this testimony for background purposes and for Mr. Handelman's own understanding of the transaction and not to be admitted for the truth of what the other parties understanding of the transaction was.

THE COURT: I don't know who you are talking about by the other parties, but Mr. Handelman can only testify as to what he knows. I assume that is all he will do.

MRS. WESTEN: Yes, your Honor.

THE COURT: Proceed, Mr. Handelman.

THE WITNESS: Your Honor, without going too far back at one time Mr. O'Conner who was part of the

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corporation known as O'Conner & Gordon, and they were a client of my office. They dissolved their business and each went their separate way. Mr. O'Conner came to me with respect to some matter he then had pending, and I had at that time formed a corporation called the Graphic Arts Exhibit Building. We obtained a commitment for land at the World Fair. I think it was called the World Fair '64 or '65 or thereabouts.

Q That's right.

A And we had gotten out a brochure of which this is a copy.

THE COURT: Perhaps we better mark that as an exhibit.

THE WITNESS: I have here the document from the World's Fair which shows the particular lot and block 8, Lot 4 on which this pavillion was supposed to be built.

THE COURT: That will be received. Do you have any objection, Mrs. Westen?

MRS. WESTEN: This appears to be irrelevant and immaterial to the case.

THE COURT: I don't know why but your objection is overruled. Both will be received.

THE CLERK: Petitioner's Exhibit 22 and 23.

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A We had established an advisory committee for this building which was to cater to the Graphic Arts, we had some outstanding people like Bennett Cerf and Cass Canfield and Arnold Gingrich and others in the publishing field. We had explored the interest of the graphic arts industry, and the project was moving along to the point where we went about to hire an organization to actually obtain the leases on this, the leases of the building space.

Mr. O'Conner was a pretty good promoter, and when he heard about it he got enthused about the thing and he wanted to become the renting agent for the property and in June of '61 he entered into an agreement and he was to receive compensation and a little stock interest and so forth and he was also to provide some working capital for the corporation, approximately $100,000 worth at that time in return for his getting this position. He no sooner got it he came back a short time later and he wanted to acquire the entire corporation, and we ultimately--

THE COURT: Sometime later. Could you estimate the approximate time?

THE WITNESS: Yes, your Honor.

THE COURT: I will ask you to stand back by the counsel table. We only want one witness to testify at a time.

THE WITNESS: It was within a month or two,

your Honor, and--

THE COURT: Was this 1960?

THE WITNESS: '61. It was still in '61.

THE COURT: All right.

THE WITNESS: I believe it was in '61.

THE COURT: Mr. O'Conner decided it looked good and wanted it all.

THE WITNESS: Of course my feelings were hurt. He didn't want me. He didn't want me in there, but I entered in this deal and the arrangement for payment--

THE COURT: Well now, when and where and what was the deal you are talking about?

THE WITNESS: Well, the deal was the sum of $221,000 for my stock.

THE COURT: When was that agreement?

THE WITNESS: That was in '61 and he made an initial payment of $25,000 on that.

THE COURT: Was there any record made or anything of that agreement?

THE WITNESS: Yes, there was an agreement and he gave me notes for the balance.

THE COURT: Do you have that agreement or has it been stipulated to?

THE WITNESS: I think that was stipulated.

THE COURT: Is that in the stipulation?

MRS. WESTON: No, it isn't. I can submit the various agreements that were entered into by the parties. They are exhibits to the moving papers if your Honor would like it.

THE COURT: It would seem to me if the witness will testify to have any contemporaneous records of the agreement submitted inconnection with his testimony--

MRS. WESTERN: There were various escrow agreements and other agreements, your Honor. They are attached as exhibits to the papers, the Plaintiff's papers when he moved for a summary judgment. We would request your Honor that all of the papers that were considered by the Court in connection with the motion for summary judgment be submitted because they are very material to this trial.

THE COURT: That's the Plaintiff's motion for summary judgment?

MRS. WESTEN: Yes.

THE COURT: The parties want to offer that as a joint exhibit?

MRS. WESTEN: Yes. I would like to offer it, your Honor.

MR. JAFFE: I object because they may have extraneous information in there, has no bearing on this particular case.

THE COURT: This is the plaintiff's motion. This is not what the defendant may have said but what the plaintiff said. You might object to the relevancy, Mr. Jaffe, but that will be decided when we see the objects. Subject to your right as to relevancy can you see any other objection why we shouldn't receive this? Bear in mind, Mr. Jaffe, if we will talk about agreements, the Court would like to see the agreement or see the memorandum, not just have a witness say sometime in '61 and sometime later and so forth. That type of testimony isn't very helpful.

THE WITNESS: Your Honor, I was coming to these agreements. There are several of them. The first--

THE COURT: Maybe this will take care of it.

MR. JAFFE: I will agree to all agreements themselves, not to the affidavit that may appear.

THE COURT: Is this affidavit by the Petitioner?

MRS. WESTEN: There were affidavits by the

Petitioner as well, your Honor.

THE COURT: How can you object to the Petitioner's affidavit?

MR. JAFFE: We will agree to the affidavit by the Petitioner together with any and all agreemen therein.

THE COURT: Second cause of action, third cause of action. This is the Petitioner's suit file as an outcome of the transaction to which you are testifying. Is that right, Mr. Handelman?

THE WITNESS: I don't know which one you are looking at.

THE COURT: You mean there is more than one

THE WITNESS: Yes, there is. It's complicated.

THE COURT: Against Joan C. Van De Maele and Thomas R. O'Conner?

THE WITNESS: No, no. I thought you were referring to an exhibit.

THE COURT: This will be received as the next numbered Joint Exhibit subject to Petitioner's right to object as to relevancy.

Miss Westen, you have more than the complain attached here.

MRS. WESTEN: The moving papers--

THE COURT: Well, the Court as I have told you before, we have no intention of letting you put into evidence an affidavit by the Defendant here. You want the testimony of the Defendant, you will have to bring her in. There is no basis you can tell me on which that is admissible. The Plaintiff's complaint is being admitted as a joint exhibit, and I assume we will have to have a copy made and substitute the copy for the original?

MRS. WESTEN: Yes, your Honor.

THE CLERK: For identification Joint Exhibit 24.

THE COURT: Now, we will also have an affidavit here or affirmation on the part of the Plaintiff. It seems to be a brief of some kind. Do you want that in too?

MRS. WESTEN: Yes, your Honor.

THE COURT: That will be admitted as a statement by the Petitioner.

THE WITNESS: That is dated July 16th, your Honor?

MRS. WESTEN: It is at the rear of it.

THE COURT: Looks like September, '65.

THE CLERK: Joint Exhibit 25.

THE COURT: Is this the order to which you

referred to previously, Mrs. Westen?

MRS. WESTEN: I believe it may be, your Honor.

THE COURT: Now we will put the order in at this time, the order of the Court in this matter. That will be a joint exhibit.

THE CLERK: Joint Exhibit 26.

THE COURT: Now I assume those agreements are all attached in evidence to those documents.

THE WITNESS: May I see those, your Honor.

THE COURT: Those are the ones that aren't going in. Now, let's see the complaint, Mr. Clerk. All right. This is the Petitioner's Joint Exhibit 24R. Now, perhaps this will help refresh your recollection, Mr. Handelman.

THE WITNESS: Thank you, your Honor.

THE COURT: Now, you were saying sometime in 1961 you entered into an agreement with Mr. O'Conner at which point the Court wanted to know whether or not you had any contemporaneous or extraneous memorandum. I assume he didn't give you the $25,000 without having something?

THE WITNESS: Yes. WE had so many things, your Honor. We had the notes and agreements, and the first thing that had happened was we established

an escrow with the Chemical Bank. That was attached. It's Exhibit 2 attached to this complaint.

THE COURT: That's Exhibit 2 to the complaint?

THE WITNESS: Yes.

THE COURT: So he put up some money?

THE WITNESS: Yes, and upon the payment of the money he was to receive the stock which we had placed in escrow with Austin Grave who is the manager of that bank up on Madison Avenue. There was a default and the payment was--

THE COURT: When was the default? He paid in '61 how much?

THE WITNESS: In '61 he paid $25,000.

THE COURT: Paid $25,000 in '61.

THE WITNESS: If I may look at the agreement I could tell you what date he was supposed to pay by. As your Honor will notice from this agreement it was an escrow that covered not only my shares of the stock but the shares of the other stockholders in the Graphic Arts Corporation. Now, as to the date it was to be payable in September of '62.

THE COURT: That was the next payment after the $25,000?

THE WITNESS: That's right, sir. In other words, pursuant to the escrow all the payments were

to be made in '62.

THE COURT: Pay the balance in September of '62?

THE WITNESS: Yes. There was a default on that.

THE COURT: September, '62?

THE TITNESS: Right. Then he came back and wanted another chance at it and we arranged-- well, we had some extension I see here extending the closing date from June 15th, '62 to July 11th, '62 and subsequently upon default there was another escrow established in the Banker's Trust. I don't see a copy of that.

THE COURT: On default you became entitled to the-- you and your participants became entitled to the $25,000?

THE WITNESS: Yes.

THE COURT: How much of that was yours?

THE WITNESS: I think that was all mine.

THE COURT: All yours?

THE WITNESS: Yes.

THE COURT: Then in '62 at some time you entered into a new escrow?

THE WITNESS: Yes which I do not see. That should be here. Bear with me a moment. Apparently

that isn't attached here. Well, at any rate there was a default in that, and then there was another escrow established in Texas. That's Exhibit 6. It is attached to those papers.

THE COURT: You mean there was a Banker's Trust escrow on default on that one. Is that right?

THE WITNESS: Yes.

THE COURT: And what was the terms of the Banker's Trust escrow? Do you recall?

THE WITNESS: Oh. Here is the Banker's Trust escrow. That was in the event the aforementioned loan agreement is not culminated on or before March 15th, '63 at three p.m. said certificates will be returned to Philip Handelman.

THE COURT: How much did they put up for the Banker's Trust?

THE WITNESS: No money.

THE COURT: No money at that time?

THE WITNESS: No. Then the next one was at the Republic National Bank of Dallas, Texas, and the closing date there was to be March 25, '63.

THE COURT: How much was that? Was any payment made?

THE WITNESS: No, I don't believe there was any payment at that time. That again ended in a

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default and the certificates--

THE COURT: Now, when they defaulted on these, you mean they defaulted before they made any payment?

THE WITNESS: By that time they had made two payments, the $25,000 in '61 and the $40,000.

THE COURT: That had already been defaulted, that had nothing to do with the Republic National?

THE WITNESS: No. They had paid the $40,000 in '62.

THE COURT: Paid the $40,000 when?

THE WITNESS: In '62.

THE COURT: In connection with which escrow would that be?

THE WITNESS: That was in order to get an escrow if my memory serves me. In other words, they made a partial payment and then signed some new notes and also agreed to a $24,000 increase in the price.

THE COURT: By the time you got around to Dallas, the Dallas escrow they paid $25,000 and $40,000. What about the $30,000? Had they paid the $30,000 also?

THE WITNESS: The $30,000 was in '63 and the Dallas-- that was in connection I believe with the Dallas escrow because that was in '63.

THE COURT: Does the Dallas escrow show any payment at that time?

THE WITNESS: Well--

THE COURT: What does it set forth as to what the parties will do?

THE WITNESS: It was to culminate by March 15th.

THE COURT: That was the Dallas--

THE WITNESS: No. That is dated March 15th, 1963.

THE COURT: Republic National Bank?

THE WITNESS: Yes. Then there is another one March 20th. Apparently there was-- something went wrong in Texas. They needed more time.

THE COURT: How much money was paid in connection with the Republic National Escrow?

THE WITNESS: Well, that was the $30,000, your Honor.

THE COURT: We got $30,000 then and we got $40,000--

THE WITNESS: $25, $40, $30.

THE COURT: You got 25 in 1961 and--

THE WITNESS: 40 in '62.

THE COURT: 40 in '62 in connection with the second escrow which was defaulted--

MRS. WESTEN: Your Honor, it hasn't been established that in fact this was in connection with the second escrow or that the agreement required that payment--

THE COURT: Well, this is what the Court is asking. I am asking the witness that.

THE WITNESS: Well, the escrow simply set forth the terms on the part of the escrowee and the person to make the payment. I insisted on payment and these are three payments I got, the first of $25,000 on the original transaction, $40,000 on the next in '62 and $30,000 in '63, making a total of $95,000.

THE COURT: That is the $95,000 we have in question. Now then, later on you got some notes on top of that?

THE WITNESS: We had the notes at that time.

THE COURT: So at some stage of the game you decided you would go for specific performance rather then default?

THE WITNESS: That's right because they had already fouled up this transaction in that they had become officers, and in order to facilitate the raising of their money we had to make Mrs. Van De Maele and Mr. O'Conner officers of the

corporation.

MRS. WESTEN: I object to this.

THE COURT: Objection overruled.

THE WITNESS: So I sued on the notes.

THE COURT: But now when you said fouled up, do you mean by then you weren't interested in taking it back from the owners?

THE WITNESS: They had already taken up this committee and they had moved around and they had it pretty much-- I hate to use the word contaminated. It was already their transaction from all apparent purposes.

THE COURT: This venture was never carried through?

THE WITNESS: That's right. We merely started pilings out there and there was a default on the lease. Only $100,000 was paid on the lease.

THE COURT: They paid that?

THE WITNESS: Yes. That was arranged through a loan. They had to pledge a horse, a racehorse. They had to sue on that too.

THE COURT: I suppose you can ask the witness any questions you have.

MRS WESTEN: Are you finished with the witness?

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Q At the time the stock was supposedly transferred in '62 was the corporation valid?

A Yes.

Q Was the corporation also valid in '63 in Texas by proclamation?

A Yes. We qualified the corporation in Texas for the purpose of that escrow because O'Conner and Van De Maele were borrowing money from a Texas bank and they couldn't arrange the loan without having the corporation qualified.

MR. JAFFE: Can I offer this statement in evidence showing that the corporation was in existence at that time?

THE COURT: Mr. Jaffe, this statement shows that you filed the necessary documents in Texas on the assumption that this was a foreign corporation but actually the certificate wasn't issued by Texas. Was it?

MR. JAFFE: No. It was issued here.

THE COURT: I think you will find that in accepting these Texas doesn't check to see whether or not you are a corporation.

MR. JAFFE: They usually do.

THE COURT: Mark this for identification.

THE CLERK: Petitioner's Exhibit number 27

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for identification.

THE COURT: Mrs. Westen?

MR. JAFFE: One other thing I would like to add.

THE COURT: Let's see if we have any objection to this exhibit.

MRS. WESTON: Well, my objection is that, your Honor, it is immaterial and irrelevant.

THE COURT: Well, it's relevant. Respondent contends as of this date there was no corporation in existence.

MRS. WESTEN: No, as of the date the stock was transferred in fact there was no corporation.

THE COURT: That would be immaterial and irrelevant I think at least from the mind of the Court if you are talking about 1966, '67.

MRS. WESTEN: Well, it's the Respondent's position, your Honor, in fact there was no transfer of property prior to 1970.

THE COURT: Let's take a hypothetical case. Maybe we can shorten this considerably. Suppose I agree to sell some stock in a corporation for a $100,000 and the buyer-- I have a buyer, and the buyer agrees to buy it for $100,000. He is going to pay me $10,000 down and the stock is put up with

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the Bankers Trust in escrow and they will release the stock to him when he pays in the other 90, and at some later time why the corporation goes out of existence but then in the meanwhile I assert an obligation against him for the other 90 and collect it from him. Now, in effect he became the buyer of the stock. Did he not?

MRS. WESTEN: No, your Honor. When your Honor reads the agreement he will see that the prices on these agreements vary.

THE COURT: The Court talks about something else. If it is the Respondent's position in this case that because of a forfeiture the amounts which may have been forfeited as of that time are ordinary income and are not reportable on the installment basis, that is one thing. If the Respondent's position is because of the fact by the time the Petitioner was able to enforce the specific performance of the contract there was nothing left to sell, that's a different question.

MRS. WESTEN: Well, it is the Respondent's position there was a forfeiture, that there was never any performance of the contract. The action in the Court was based on the promissory notes. It was not brought on by the contract.

THE COURT: It's the Respondent's position while Petitioner collected the sales price there wasn't really a deal because by that time the dog had died. Is that it?

MRS. WESTEN: That's part of it.

Q Was that judgment ever collected?

A Yes, sir.

Q When was it collected?

A It was in 1970.

Q '71?

A YES, '71. It was compromised for $89,500.

Q That was the balance?

A Yes.

Q In other words, you collected $95,000 plus $89,000, whatever it is?

A Yes, $500. We also compromised another. Well, they compromised the other judgment for the other.

Q Other officers?

A Yes.

THE COURT: It seems to me the problem is not related so much to that as to the fact that when there is a default and the parties are entitled to retain the amounts heretofore paid then you make a new escrow and you've got a whole new ballgame. Whatever he became entitled to as a

result of the prior default is ordinary income. I don't see how you can avoid that.

MR. JAFFE: My argument is--

THE COURT: You keep tacking defaults on.

THE WITNESS: It was a continuing transaction, your Honor. The fact that you give a buyer an opportunity to cure his default by paying doesn't mean that you have a new transaction. The only thing new is you are giving him a new opportunity to pay.

THE COURT: When you raise the price you can't say it was just an extension. That's the whole problem. Anyhow, I assume the agreement will enable us to make a decision.

THE WITNESS: What your Honor refers to, to raise the price of that $24,000, there was no notes for that. That was an oral promise to pay for the extension of time, but an extension of time is frequently in many contracts.

THE COURT: That's right.

THE WITNESS: That doesn't change the initial contract. It's the same stock, same building, and basically the same price.

THE COURT: But your sellers changed. Didn't they?

THE WITNESS: The sellers?

THE COURT: I mean the buyers?

THE WITNESS: No.

MR. JAFFE: No, same buyers.

THE WITNESS: O'Conner and Van De Maele were partners in that. They were at all times. O'Conner had no money and Van De Maele who was a Gugenheim was doing the financial backing for O'Conner.

THE COURT: Are you finished?

Q The only transaction involved in there was the sale of those stock certificates and they had been delivered at the time the final payment was made and that's--

THE COURT: You mean after the corporation became defunct?

MR. JAFFE: That's right.

THE COURT: I think you have to assume that you had a dead horse then.

THE WITNESS: A lot of those World Fair transactions, your Honor, were dead horses before the Fair was over.

THE COURT: That's right. Mrs. Westen's point there is well-taken. By that time all you were dealing with were pieces of paper.

THE WITNESS: Whether a project is

successful, your Honor, it never affects the initial transaction.

THE COURT: That's another matter. I think in substance you collected your purchase price and whether or not you delivered anything is another matter.

THE WITNESS: What I think, your Honor--

THE COURT: Is that your point, Mrs. Westen?

MRS. WESTEN: Yes.

THE WITNESS: What I delivered was the original stock that I was supposed to deliver. That's all I was supposed to deliver. I wasn't supposed to deliver any land or anything else, no material things other than the corporate outfit and the stock.

THE COURT: Are you finished? Do you wish to interrogate Mr. Handelman?

MRS. WESTEN: Not at the present time with respect to this issue, your Honor.

THE COURT: What do you mean? The present time is now.

MRS. WESTEN: Isn't it customary, your Honor, to finish the Petitioner's case?

THE COURT: Are you going to cross examine him?

MRS. WESTEN: We seem not to be disagreeing

on what occurred.

THE COURT: That is what the Court felt right along here. The Court failed to see why there was any disagreement on what occurred.

Thank you, Mr. Handelman.

Petitioner's Exhibit 27, do you object to that?

MRS. WESTEN: I object to it on the basis of relevancy and materiality and the--

THE COURT: Do you concede that the corporation was a viable corporation on April 28th, 1964-- no, April 15th, '63?

MRS. WESTEN: The corporation did not pay any taxes after 1961?

THE COURT: I don't know.

MRS. WESTEN: That is a question of law I would have to research.

THE COURT: This would indicate they were doing business as a corporation in Texas in April, 1963. Is that right?

MRS. WESTEN: Well, your Honor, I would have to research the effect of non-payment of taxes under New York law.

THE COURT: I am not talking about New York. I am talking about Texas.

MRS. WESTEN: Well, I don't know what the corporation was doing in Texas, your Honor. I can't concede that which I have no knowledge.

THE COURT: This will help you then. It will be admitted.

THE CLERK: Petitioner's Exhibit 27 in evidence.

MR. JAFFE: I call Mr. Robert M. Trien.

R O B E R T M. T R I E N, 90 Riverside Drive, Manhattan, New York, sworn.

DIRECT EXAMINATION BY MR. JAFFE:

Q Mr. Trien, are you familiar with the transaction pertaining to the notes together with the stock?

A Yes, I was more familiar at the time that it occurred than I am now but I recall the transaction.

Q Were you sent down to Texas in order to collect the balance of the monies due on those stock certificates and did you have the stock certificates with you in your possession at the time for delivery purposes?

A Yes. I was associated with Mr. Handelman in 1963. Since Mr. O'Conner at that time had intended to borrow I think it was a half million dollars from the bank in Texas, some of which money was to be paid for the stock, and he wanted the stock certificates available at the time that he

made the transaction. He also thought that-- as I recall he also indicated that he thought that the presence of somebody there as attorney for the corporation might facilitate the loan. We negotiated with at least one bank in Texas but were unsuccessful in getting the loan. I did have the stock certificates with me at that time.

Q You were ready and willing to deliver the stocks--

THE COURT: Let me interrupt, Mr. Jaffe. I think this exemplifies the problem the Court sees here. When you went down to Texas with the stock certificates in your pocket there was as of that time, there was no non-defaulted agreement in effect. Was there? That was the purpose going down there, was to start all over and get a new loan? In other words, the certificates no longer were in escrow, you couldn't take them down there?

THE WITNESS: That's so.

THE COURT: Any prior escrow had been washed down the drain?

THE WITNESS: If my memory serves me I was in Dallas on two occasions: one for quite some time and one for a short time.

THE COURT: Irrespective of that if you took the certificates down there on either occasion

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it meant that there was no longer any escrow?

THE WITNESS: Well, the reason I indicated that, your Honor, was that on the first occasion my memory is that there was an escrow in effect. That was one of the escrow agreements which is already in evidence. I was there not as the holder of stock, but to make sure that no improper representations were made by Mr. O'Conner with respect to his interest in the corporation. The stock was being held by a New York bank who was directed under the terms of the escrow agreement to turn it over to Mr. O'Conner upon advice from the relationship bank in Dallas that the loan of a half million dollars which Mr. O'Conner was seeking to obtain was obtained. So on the first trip I did not have the stock certificates. But was the stock certificates in escrow pursuant to that agreement which is in evidence? I believe it was. On the second trip I actually had the stock with me after there was a default on the first and so on.

THE COURT: Proceed, Mr. Jaffe.

Q Then the only thing that Mr. Handelman was ready and willing to do was turn over the stock certificates to Mr. O'Conner at the time when he received the money and it would be a completed transaction?

A Yes.

Q The only thing Mr. Handelman had to sell at that time was the stock certificates themselves that were predated and that he had received part of the money for?

A Yes. As a matter of fact, when Mrs. Van De Maele was represented by Mr. Chase, Owine and some other name in a law firm here in New York, and Mr. Chase required we make representation as to the viability of the corporation at the time of the escrow agreements because he wanted assurances the corporation was in effect and valid at the time that the payment was made, was to be made.

Q Do you know of your own sources that Mr. Handelman is lawyer, that he does not deal in business of stocks and securities?

A Yes.

Q This was an isolated transaction for the sale of securities in the Graphic Arts?

A I am not sure what you mean by that last question.

THE COURT: I don't think that this witness is competent to answer that question. I don't think that is an issue in the case.

MR. JAFFE: Well, the whole issue is whether or not there was capital gain.

THE COURT: That's right. It is not

predicated, Mr. Jaffe, on any concept Mr. Handelman is a dealer in securities. You will concede, Mrs. Westen, Mr. Handelman was not a dealer?

MRS. WESTEN: Well, I don't know that he was a dealer in securities.

THE COURT: That is not the basis for the Respondent's determination?

MRS. WESTON: No, your Honor.

MR. JAFFE: Okay. Thank you.

CROSS EXAMINATION BY MRS. WESTEN:

Q Mr. TRien, was that escrow agreement executed? That was not executed? In other words, the escrow was not completed at that time and there was no delivery of stock at the time you went down to Texas?

A Which question you want me to answer first?

Q All right. Was there a delivery of stock to Mr. O'Conner at the time you went down to Texas? Was the stock paid for at that time?

A If you mean was the balance due paid so that I delivered the stock certificates or authorized the bank to deliver the stock certificates?

Q Correct.

A That balance was not paid, no.

MRS. WESTEN: That is my only question, your Honor.

THE COURT: Is that all?

MRS. WESTEN: Yes, your Honor.

THE COURT: You may be excused.

Mr. Jaffe?

MR. JAFFE: I noticed Mr. Corbet, the agent for 1961 in Court. I would like to ask him a couple questions on some of the reports. I would like to call Mr. Corbet.

THE COURT: Let him take the stand and then the Respondent can interpose any objection.

R E N E C O R B E T, 9060 Union Turnpike, Glendale, Queens, New York, sworn.

MRS. WESTEN: Respondent objects to calling the Respondent's agent as a witness on the grounds that his work papers and his reports are privileged and that the burden is--

THE COURT: Objection overruled and I will wait until counsel asks the question and then you can object.

DIRECT EXAMINATION BY MR. JAFFE:

Q Mr. Corbet, you are a revenue agent. You were a revenue agent at the time you made the initial examination of the books and records of Mr. Handelman?

A Yes, sir.

Q Is the accounting or auditing an exact science?

A I don't know.

MRS. WESTEN: Objection, your Honor.

THE COURT: Objection sustained.

Q Would you say if you examined the same set of books twice you would come out with the same answer?

MRS. WESTEN: Objection.

THE COURT: Objection sustained.

Q Is it possible that you examine the same set of records that you file one revenue agent report and subsequently change it--

MRS. WESTEN: Objection.

THE COURT: Objection sustained.

MR. JAFFE: I didn't even finish the question.

MRS. WESTEN: He is asking for an opinion, your Honor.

THE COURT: Mr. Jaffe, without some basis other than just the mere effort to show that there may have been a different position taken at some phase of this examination where the Court assumes that is what you are seeking to show, that's totally immaterial and irrelevant, and the fact that the agent may change his mind or the Respondent may

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change his mind or Respondent may change his mind, and we are concerned now with--

MR. JAFFE: We are concerned with specifics here.

THE COURT: With whether or not this is an installment sale. If this is, whether or not the Petitioner is entitled to report it as capital gain and so forth. It makes no difference what somebody may have thought it was on a prior examination.

MR. JAFFE: I am not going into the installment sale. I assume at this point the installment sale-- I can issue a memorandum of law.

THE COURT: Are we getting to the boat.

MR. JAFFE: The disallowances themselves.

THE COURT: What do you mean disallowances?

MR. JAFFE: Changes in the amounts disallowed.

THE COURT: It's up to the Petitioner to establish those at the hearing. If you have any basis to establish them, we will take that, but you can't establish them on the basis of the Revenue Agent's examination, whether he allowed them or not. In the first place we got 274 years. I think you are equally familiar with those rules.

MR. JAFFE: That's right.

THE COURT: What do you have?

MR. JAFFE: Well, all the books and records here at that time, and when you get an R. A. R. you get a total rather than specifics.

THE COURT: There are specific amounts claimed in the return. If you want to go into evidence as to each and every one of those amounts, fine and dandy. Have you got your workpapers here?

THE WITNESS: No, I don't. Maybe Miss WEsten has.

THE COURT: The Court wouldn't admit the work papers, if he had them. It's the taxpayers' papers.

MR. JAFFE: Well, if we take his papers he disallowed certain items and ran off a total. We want to show the items are not--

THE COURT: Is this for the purpose of identifying the items?

MR. JAFFE: That's right.

THE COURT: Well, the Court will call upon the agent to identify the items because there is a reasonable request where you are disallowing a percentage or an amount of an account why the taxpayer doesn't know what has been allowed and what has been disallowed specifically.

MRS. WESTEN: Your Honor, this agent performed the audit only for the year 1961.

THE COURT: I think the stipulation covered that to some extent.

MRS. WESTEN: Yes, it does. It shows the amount disallowed.

MR. JAFFE: Total amount disallowed. That's all.

THE COURT: Well, if you-- let's take the boat. The Respondent says that on the basis of prior years he will allow twenty-five per cent up until the year when Section 274 applies. From 274 you have to prove more than fifty per cent.

Are you prepared to prove more than fifty per cent?

MR. JAFFE: Yes.

THE COURT: Let's get Mr. Corbet off the stand and get Mr. Handelman back on.

P H I L I P H A N D E L M A N, previously sworn.

DIRECT EXAMINATION BY MR. JAFFE:

Q Mr. Handelman, you own a boat. Will you describe this particular boat?

A Forty-six foot sloop.

Q A sailboat?

A Yes.

Q For what purpose do you use that boat?

A I have used the boat primarily for entertainment and promotion with the idea of creating clients and obtaining legal retainers.

Q What percentage of the time would you claim you use the boat for that specific purpose?

A I would say that it is at least eighty per cent of the time, and at no time has my family in any way participated. Neither my wife or children have ever gone boating. They all had other interests and other diversions, and I have used it solely to cultivate prospective clients.

Q Do you belong to any golf clubs or any other clubs where you can entertain or get clients?

A All of my entertainment has been in the yachting area. I don't belong to any golf clubs, beach clubs or anything like that. Not only have I had a lot of people on the boat, but I can actually trace the majority of my fees as coming from people that I have entertained on the boat.

MRS. WESTEN: Your Honor, we are going to object to this testimony on the grounds of its vagueness and generalness.

THE COURT: Objection sustained.

THE WITNESS: I am prepared, your Honor, to give details.

THE COURT: Have you got a log?

THE WITNESS: The way I have done it, your Honor, I have kept records, and to improve on my keeping of records my office secretary has recorded all of the invitations and the names of the people who have been entertained on the boat from time to time, and as I say I can even coordinate and trace the fees received in any particular year as to whether they emanate from boat entertainment or some other source.

THE COURT: Do you have those records back in those years when you deducted twenty-five per cent?

THE WITNESS: Back in those years, I do not. I did not keep any records of this kind. I have always refrained from keeping-- your Honor referred to the word log. I think it is self-defeating if you invite somebody on your boat or your home or a restaurant to put their name on the chit the Diner's or American Express would give you. I had to utilize other ways of keeping it, and I have turned the whole thing over to having my secretary record these things, and she tells me they are coordinated not only to the diaries but to the message books and some of the invitations of course are in writing and

we have copies of those. When the entertaining was up at the America Cup--

THE COURT: How many people can you take on the boat and entertain them comfortably, for instance, the largest number you can take at one time?

THE WITNESS: Normally you only take anywhere from four to six. When you take them up for instance to view the America Cup I can take as many as twenty, and on those occasions I even hired someone to serve drinks and take them out to see the races and bring them back and have different people come for each one of the races.

THE COURT: Do you have any records you want to offer?

Q To go into the detail before I offer the record--

THE COURT: In view of Mrs. Westen's objection, I think we are primarily interested in the records, what records there may be.

MR. JAFFE: Mr. Handelman uses the boat for races, and some of the people he has as a crew are unpaid and subsequently become clients.

THE COURT: That is a pretty common practice.

THEWITNESS: I don't think there is ever much

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question that the golfers utilize their profession to become successful insurance agents, utilize their profession for promotion. I confess the race part of the thing does me a great deal of good.

THE COURT: As one who got through working up to seventy-four feet, down and out of it, I can't conceive being able to attract by way of entertainment on a forty-six foot sailboat. It's not really equipped for cocktail purposes.

THE WITNESS: Let me say this. This is a famous boat which has won everything including the Bermuda. It is a very comfortable boat. It sleeps six people, and has a complete galley and excellent bar.

THE COURT: All, Mr. Handelman, by sailing boat standards.

THE WITNESS: Yes, your Honor, but there is much more facination to come to a layman on a sailboat than a large luxury boat. It may not be the basic comfort perhaps but people like the adventure. My theory has always been when you invite people on a sailboat you have achieved the desired result sometime even better when they don't accept your invitation than if they do because you might get people who are sick, but we handle that by entertaining,

a cocktail party in the dock.

THE COURT: Do you have records for these years and expenses?

THE WITNESS: Yes.

THE COURT: The problem as I see, Mr. Handelman, and I am familiar somewhat with your boat, is that the Bermuda races, Newport races, if you add that into the overall amount of time or the proposition of the expense allocatable to that activity is concerned, if you want to try to surmount it, I will let you try.

THE WITNESS: Let me say this: All of the costs of the boat operations are paid by check. There is no question about the amount of the costs. It's true when I say eighty per cent that is because I would say that I certainly devote twenty per cent of the time to racing and even though some of that results in publicity because we have been on the cover of Skipper and had writeups in the yachting magazines, the Times, and we have been in the National Geographic during the years in question here. I don't think that, especially in the case of a lawyer where he can't advertise since, your Honor, it's good advertising--

THE COURT: I'm not so sure, Mr. Handelman,

you can take the deduction on that basis. I think you are talking about entertainment, that is one thing. If I bought the Hope Diamond, maybe I'd get some publicity as a lawyer. Do you think that gives me a deduction for buying the Hope Diamond?

THE WITNESS: Probably not.

THE COURT: Do you have records to show how you used this boat covering the dates and the hours?

THE WITNESS: Yes, sir.

THE COURT: Do you have those? The Court will receive them.

THE WITNESS: I see my secretary has made a synopsis of them. I think she has a record of them.

THE COURT: Let's see. You want to put your secretary on the stand? Let's let her testify to that.

Do you have any questions you want to ask the witness?

MRS. WESTEN: No, your Honor.

JOSEPHINE ADKIN, 2400 Hudson Terrace, Fort Lee, New Jersey, sworn.

DIRECT EXAMINATION BY MR. JAFFE:

THE COURT: On the ten-day report how much time did you give this case? Was it one hour?

MRS. WESTEN: I don't recall whether it was one hour or two hours. I think two hours. It was misestimated.

THE COURT: You may proceed.

Q We will start with the calendar year 1961. During that year what records have you got to show that clients, prospective clients were on the boat?

THE COURT: Let's put it differently. What records do you have to show the overall use of the boat in the year 1961? What percentage of that overall use was used in connection with the taxpayer's business?

THE WITNESS: I have telephone message books. I have Mr Handelman's diary and I have a summary.

THE COURT: Does Mr. Handelman's diary show every time he went sailing?

THE WITNESS: Yes, it does.

THE COURT: You made a summary from that showing everything?

THE WITNESS: Yes, I did. This is a summary from 1961.

THE COURT: Let's mark that for identification.

THE CLERK: For identification Petitioner's Exhibit 28.

THE COURT: Is this summary of every time when Mr. Handelman went sailing?

THE WITNESS: No, sir.

THE COURT: Just a summary of the time he went sailing with people?

THE WITNESS: Yes, sir.

THE COURT: I am afraid this doesn't show what the percentage may be.

MRS. WESTEN: May we ask some questions about that.

THE COURT: Yes, you may look at it. I don't think it proves anything. I haven't admitted it yet.

MRS. WESTEN: May I ask when this summary was prepared?

THE WITNESS: Prepared about three weeks ago.

MRS. WESTEN: And as your Honor said--

THE COURT: Mrs. Westen, if you want to be technical about the objection, I will overrule you. The witness testified she got the report there. You examined the records, and this is a summary that she prepared from the records. As such it's being

offered. Do you object to it as such?

MRS. WESTEN: Not as such.

THE CLERK: Petitioner's Exhibit 28 in evidence.

THE COURT: Do you have a summary for 1962?

THE WITNESS: Yes.

THE COURT: We will mark that for identification.

THE WITNESS: I think, your Honor, you might be interested in also letters from people that have turned down Mr. Handelman's invitation to the America Cup.

THE COURT: I don't think when somebody turns it down, that becomes a proportionate part of the use.

THE WITNESS: No, but I have a list of the people invited.

THE COURT: That the Court will have to exclude. This is a summary for the year 1962. Let's mark that for identification.

THE CLERK: Petitioner's Exhibit 29 for identification.

THE COURT: Do you have a summary for the year 1963?

THE WITNESS: Yes, sir.

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THE COURT: Mark that for identification.

THE CLERK: Petitioner's Exhibit 30 for identification.

THE COURT: Do you have a summary for the year 1964?

THE WITNESS: Yes, sir.

THE COURT: And one for '65?

THE WITNESS: Yes, sir.

THE CLERK: Petitioner's Exhibit 31 and 32.

THE COURT: These show the occasions in which Mr. Handelman entertained clients or prospective clients on his boat.

MRS. WESTEN: May we establish, your Honor, whether or not all these were prepared just a few weeks ago?

THE COURT: These purport to be summaries of the records?

THE WITNESS: Yes, summaries of records, books.

THE COURT: Just a summary of what the witness has before her. It's very helpful she prepared it in that way.

All right. Now, we come to the other entertainment. What do we have on the other entertainment? That will be received in evidence.

THE CLERK: Petitioner's Exhibits 29 to 32 in evidence.

THE COURT: The number of people invited is not-- does not have any relationship to the use of the vessel. The Court will so rule and give you an exception, Mr. Jaffe.

BY MR. JAFFE:

Q Would the diary show the number of days that the boat was available for use with Mr. Handelman as the skipper?

A Yes.

Q What percentage of the time, of usable time would you say that Mr. Handelman had clients or prospective clients on the boat?

MRS. WESTEN: Objection.

THE COURT: Sustained.

MR. HANDELMAN: If I may interject since you are familiar with boats and take judicial notice of the number of weekends which are suitable for entertaining on boats. We don't invite people out in May when it is cold.

THE COURT: That's right. On the other hand I think you have to assume in 1962 for example you would be somewhat reluctant to keep a boat if you were going to take people out seven times during

the course of the year.

THE WITNESS: I think after the parenthesis there in '62 where I would like to add this as the extention to that list, the America Cup races were in September, '62.

THE COURT: I know. That is one occasion.

THE WITNESS: The boat was up there three or four weeks.

THE COURT: The Court realizes that. The Court was up there also. This is on a day to day basis. How often did the taxpayer use the boat? What part of that was for business purposes as we get down into a question of a enumerator and denominator. These are all admitted as summaries from the diary.

MR. HANDELMAN: There are only twelve weekends available, your Honor except during a period you take it south or something like that.

MR. JAFFE: Will your Honor set a brief showing the enumerator and the denominator for each year predicated on the years--

THE COURT: I don't know.

MR. JAFFE: We will stand or fall on the percentage of time that the boat was available for use together with the time that it was used for

entertainment purposes.

THE COURT: Let's get to the other entertainment.

MR. JAFFE: If we were allowed to examine the agent's worksheet to determine whether or not he examined these or allowed them--

THE COURT: Let's recess and why don't the parties get together and go over these, Mrs. Westen, get the agent to go over them and let's see whether or not the taxpayer has some substantiation here. Let's allot it to him and not go through the trouble of coming before the Court. With respect to the boat expenses I can't be too critical to the Respondent. The Respondent allowed twenty-five per cent for the years '61 and '62. The exhibits offered by the Petitioner show very, very few occasions in those two years as compared with subsequent years showing less than half, then you come up with '64, '65, and irrespective of the reasons. Mr. Handelman, sailing in Newport races or something like that, this Court would not regard as using the boat for entertainment. If you sail in races that time has to be deducted, and I don't think the Respondent would seriously argue that the boat wasn't used to some extent for promotional purposes.

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Unfortunately when we get to '63 and '64 it has to be more than fifty.

Now, we have the same problem in dependency cases. If your son was drafted in September, how will you prove you provided for more than fifty per cent of his support?

MR. HANDELMAN: The only reason Respondent allowed twenty-five per cent, and this is by her own admission, in the first two years, that has been allowed previously.

THE COURT: That's right, Mr. Handelman. The agent can always do that. He wouldn't be required to substantiate having allowed that.

MR. HANDELMAN: I am not relying on what was done in some prior year. What I am trying to point out is if you calculate those dates, take the available season, and that's the basic way to find it out. You don't entertain people in the boatyard when you are fitting out in April or May. You entertain during the major twelve weeks. In other words, you wouldn't have had them aboard in that time. The dates are there. They will show that the prime time of the boat was used for entertainment.

THE COURT: That may well be.

MR. HANDELMAN: If you look into the later years I am sure, your HOnor, you will find we sometimes enlarged the season a little bit by taking it down to Chesapeake and in current years I am taking it down to Florida and entertaining there. I can say to you I have some Florida clients out of it. I don't know how you can do any better than take the available time and you can follow those weekends because it's primarily on weekends with the exception of a few cocktails or something, someone who , you know, doesn't like to actually sail, have them up for dinner on the boat because as I said we have good facilities for that. I don't know what kind of boat your HOnor is referring to, but certainly there has been more entertainment done on sailboats in recent years. That's what the glamour part is. I submit it may be a sneaky way to practice law. I do think utilizing a little glamor, giving somebody what they think they want-- it may be your tie or the curl of your hair-- I don't know how one selects a lawyer, but I have been fortunate. I have had a few cases on the books that involve millions of dollars coming directly from that field, and after all, I hit on this idea some years back, and I am now really for the first time cashing in on this program because

that's where my analysis was that people in the boating field, just as in the entertainment, manufacturers and so forth, those are the people who spend money. If they spend money they have money, and they make good clients. I have some darn good clients out of it not only in this area but in Washington, the South, around the country.

THE WITNESS: I would like an opportunity, your Honor, to testify to the names of some of these clients.

THE COURT: If Petitioner wants to submit a list of the names of the clients, I assume that--

MR. HANDELMAN: I assume that all those you listed as being entertained are clients. Is that right?

THE WITNESS: They don't all become clients.

THE COURT: The problem with prospective clients is everybody is a prospective client.

MR.HANDELMAN: I would say the batting average is better than fifty-one.

THE COURT: I am quite sure it is.

MR. HANDELMAN: I want to say there is a case in the office at the present time the result of a man who was a crewman on the boat-- will you please allow Mrs. Adkin to testify to that.

THE WITNESS: There are several things that might help you substantiate this. Mr. Handelman is a member of the Trial Lawyers' Association, has been for many years. Mr. Dangel has personally requested Mr. Handelman to bring his boat to Massachusetts, the Massachusetts area to entertain other members of the Massachusetts Trial Lawyers' Association. Mr. Handelman has done so and has entertained them, and we have received through the years many cases referrals directly from Boston and from Mr. Dangel.

THE COURT: Let me ask you this: Was the same boat involved in the prior case?

MR. HANDELMAN: No.

THE COURT: Was the use of this boat any different?

MR. HANDELMAN: It's larger.

THE COURT: How many years-- when did you get this boat?

MR. HANDELMAN: '58. As I went along I learned more about how to utilize the boat in entertaining and so on in such a way as to get some results. You don't learn that in a day.

THE WITNESS: If I may continue, Mr. Peter Weinberg, who is an avid boatman is also

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president of Propulsion Systems crewed for Mr. Handelman about the early part of last year, and Mr. Weinberg became a client of the office, and now as a result of that we now have one of the biggest cases we have in the office which is Propulsion Systems and related suits throughout the country, one in New Orleans, and I can go on and on.

MR. HANDELMAN: Go ahead.

THE COURT: Well, we have a two-fold problem here. We have a different problem. I would recommend for the future you keep much more meticulous records. I am not so sure whether even the best records do any good any longer.

MR.HANDELMAN: I think our records, we have plenty of records, but I have purposely refrained from asking-- I have seen many people ask someone to sign a log. I think you defeat your purpose.

THE COURT: I think you know Mr. Henry. He asks you to sign a board and nobody minds.

THE WITNESS: I agree with your Honor, Mr. Handelman, and I asked you to keep a log.

MR. HANDELMAN: You don't create the picture you want to.

THE COURT: Try to see if you can resolve the expense issues. That will leave one issue for decision. In any event, do you want to close the record as it is now? Is there anything else?

MR. HANDELMAN: I would like to testify also with respect to fees in connection with this boat.

THE COURT: I think, Mr. Handelman, we can assume that the entertainment of those listed on the summary prepared by your secretary, it's actual clients or reasonable prospects. I am sure you are not taking out economic opportunity lawyers or anybody like that on this boat.

MR. HANDELMAN: What I want, your Honor, I want to show that not only these listings are not just prospects. These are people that I can tell the proportion of the gross of my fees and what comes from the boat is far-- I would say it is easily seventy-five percent of the gross of my fees can be traced directly to this boat. That is a pretty large percentage.

THE COURT: If you want to go through the fees that you received during the year in question and identify those as having been out on this boat--

MR. HANDELMAN: I would also make this

point: For example, some of the fruits come a year or two later. This year we had a decent gross of over $300,000, and seventy-five per cent of that can be traced directly to the boat. It didn't occur in one day. You don't take someone out in July and necessarily get a piece of business that year.

THE COURT: Suppose you sit down with the Petitioner and see if that's the correct statement. We have to take another look at this.

MRS. WESTEN: If they have the evidence, we will be glad to take a look at it.

THE COURT: That kind of determination can be made much better with the parties sitting down reviewing what the Petitioner has. Let's recess and the parties can report back during the course of the calendar up here as to whether or not you were able to resolve this expense issue. At that time we will set the brief date on the principal issue.

MR. JAFFE: How long is the Court sitting?

THE COURT: The Court will be here all this week and at least part of next week.

MR. JAFFE: We will have that time?

THE COURT: Yes, but I recommend you do it -

as expeditiously as possible.

Thank you.

[Certificate of Reporter omitted]

UNITED STATES TAX COURT

PHILIP RANDOLMAN, et al,	
Petitioners,	DOCKET NO. 4913-67
-vs-	
COMMISSIONER OF INTERNAL REVENUE,	
Respondent.	

Federal Building
New York, New York

February 3, 1972

Met, Pursuant to Notice, at 10 a. m.

B E F O R E:

HONORABLE WILLIAM H. QUEALY, Judge

A P P E A R A N C E S:

HERMAN F. JAFFE,
For Petitioners,

MARION L. WESTEN, IRS, New York,
For Respondent.

Raymond De Simone
Certified Shorthand Reporter

I N D E X

WITNESS	DIRECT	CROSS	REDIRECT
Philip Handelman	10		
MARION L. WESTEN		25	
HERMAN F. JAFFE			35

EXHIBIT	DESCRIPTION	IDEN.
Petitioner's 33	Summary of boat expenses.	8
Petitioner's 34	Little Black Book of Mr. Handelman with pencil notations.	13

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THE CLERK: Docket 4013-67, Philip Handelman, and Esther Handelman.

MR. JAFFE: Herman Jaffe for the petitioners.

MRS. WESTEN: Marion Westen for the respondent.

THE COURT: All right, I believe Mr. Jaffe was presenting this case when we recessed before.

MRS. WESTEN: Yes.

THE COURT: Continue, Mr. Jaffe.

MR. JAFFE: We have reached certain conclusions relative to some of the disallowances, and I think Mrs. Westen outlined them. And in reference to the Graphic Arts, we've agreed that $25,000 was reported in '61; that $40,000 was to have been reported in '62, but at this point we have no record of it. We can't find out whether or not we did report it. So that we will concede its having been admitted in '63, $30,000 had been received and reported.

MRS. WESTEN: I'd like to qualify the one for '63, merely to state that we agree that '63 shall be deemed to be the year in which the $30,000 is taxable.

THE COURT: Okay.

MRS. WESTEN: And with respect to the other adjustments which were settled between the parties at

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a conference following the initial hearing of this case, we'd like to read into the record--

THE COURT: (Interrupting) All right, thank you.

MRS. WESTEN: --for the year 1961, the petitioners concede propriety of the adjustments setting for as items A through D and Item E of the statutory notice for said year; that is, that the following adjustments are conceded by the petitioners: Gross receipts should be increased by the amount of $2,611; wages, the deduction for wages diminished by the amount of $955.76; that the adjustment for office general expense in the amount of $2,408.41 is proper; that the reduction in commission expenses in the amount of $2,777.80 is proper.

With respect to adjustments E and G for 1961, the petitioner concedes the capitalization of certain expenses incurred and the change in the useful life of the boat for the purposes of depreciation, but the parties have agreed with respect to the remaining amounts that the petitioner may claim a deduction for 60 percent of the amount of such expenses and 60 percent of the annual depreciation as recomputed; that is, 60 percent of net expenses of $1,321.74, or $793.04, and 60 percent of the annual depreciation in the amount of $2,937.50

or $1,762.50

With respect to adjustment F, other promotion and entertainment and expenses, the parties have agreed that subject to the submission of the petitioner's affidavit, the petitioner shall be allowed a deduction for one half of the amount disallowed in the statutory notice; and that is, for 75 percent of the amount claimed, or $3,203.63.

With respect to adjustment H, the parties have agreed that the petitioner shall be allowed an additional deduction for rental expense of one half of the amount disallowed in the statutory notice or 75 percent of the amount claimed; that is, $900.

With respect to adjustment I relating to medical expenses, this is a mechanical adjustment which must await the final determination of this case.

For the year 1962 the parties have agreed that as in the earlier year, boat expenses in the amount of $4,796.92 may be allowed to the extent of 60 percent of the amount claimed, or $2,878.15.

The parties have not agreed to the allowance of the $889.62 of other entertainment expenses which was disallowed.

With respect to adjustment C, the parties have agreed that subject to the submission of the petitioner's

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affidavit, the petitioner may claim as an additional deduction $600 of the amount disallowed in the statutory notice as a deduction for petty cash office expense; that is, that they may claim a petty cash office expense deduction for the year 1962 in the amount of $3,250.

For the year 1963, under adjustment B, the petitioners concede the disallowance of unsubstantiated promotional expenses in the amount of $2,083.84. The other adjustments for 1963 are either mechanical or are unagreed.

For the year 1964 with respect to adjustment A, the taxpayers concede the disallowance of cash expenses in the amount of $500 and they also concede the disallowance of claimed gift expense in the amount of $443.81.

With respect to adjustment B, the parties have agreed that as in the year 1962, and subject to the submission of the petitioner's affidavit, the petitioners may claim as an additional deduction $600 of the amount disallowed in the statutory notice for petty office expense; that is, that they may claim a petty office expense deduction in the amount of $4,675 for the year 1964.

The remaining adjustments for the year 1964 are

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either changed and still an issue or are mechanical and must await the determination of this case, and the same is true with respect to both adjustments proposed for the year 1965.

THE COURT: Is that correct, Mr. Jaffe?

MR. JAFFE: That is right.

THE COURT: Thank you.

You may proceed, Mr. Jaffe.

MR. JAFFE: In reference to the Graphic Arts case, I'd like to submit an affidavit or a statement of law, briefs and law in reference to Graphic Arts explaining our position on the case entirely.

THE COURT: It will be received. That will not be an exhibit. It will be treated as a trial memorandum. Give a copy to the respondent.

Does the respondent have a copy?

MRS. WESTEN: No, sir.

THE COURT: This will be a trial memorandum.

MR. HANDELMAN: Your Honor, might I borrow that file--does it have the Court decision on the Graphic Arts, and if I may borrow that?

THE COURT: Yes (handing to Mr. Handelman).

MR. JAFFE: There is one other thing I'd like to bring to the court's attention. In a decision dated January 25, 1970, the court admitted into evidence on

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January 25, 1972, the remainder of the claims in relation to the balance and the purchase price of certain stocks sold by plaintiff to the defendants--

MRS. WESTEN: (Interrupting) Objection, your Honor. This is argumentative and its proper place is in the brief.

MR. HANDELMAN: It is not argumentative. It is offered in evidence.

THE COURT: It is in evidence.

MRS. WESTEN: Then it speaks for itself.

MR. JAFFE: I just wanted to point out in the first paragraph there, under Judge Lupiano, L-u-p-i-a-n-o, on page 1 starting with the word "plaintiff" and going down to the word "incredible."

I would also like to submit exhibits in reference to the boat expenses and I'd like to summarize that during 1961--what we've done here is take only those people on the boat that have turned into profitable clients, with the amounts received to date. We have omitted completely those that haven't materialized as to turning in fees as yet. But during the year 1961 the taxpayer deducted $7,858.99 for the use of the facility and grossed between 1961 and 1971 $142,895.90 as a result of those people on the boat.

THE COURT: I was figuring it out, Mr. Jaffe,

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and it looks to me like Mr. Handelman was losing money on the deal overall.

MR. JAFFE: Well, I don't think so. As a result of this we'd like to submit this.

MRS. WESTEN: We are going to object to the admission of this summary in evidence. The underlying documents are not in the courtroom we understand, and we have not seen them.

THE COURT: Objection will be sustained.

MR. JAFFE: May I put this in evidence as an exhibit and I'll have Mr. Handelman testify?

THE COURT: The witness will have to testify first before the exhibit can be marked. It can be marked for identification, but whether or not it's admissible is another matter.

THE CLERK: Mark for identification, Petitioner's exhibit 33.

(Summary of boat expenses is received and marked Petitioner's exhibit 33 for identification.)

MR. JAFFE: I call Mr. Handelman.

THE COURT: Mr. Handelman, before you're sworn, I was doing some figuring here on the sale of the Graphic stock, I realized that if the sum of $40,000 was reflected along with the sum of $25,000, during these five years you would have sustained a net loss as a

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result of the practice of law. Is that the way you figure it?

MR. HANDELMAN: I can't answer your Honor, in particular years. There have been some years when I had a loss, yes.

THE COURT: I think it would almost come out in every year.

MR. HANDELMAN: I can't be specific on that, your Honor. Not in every year, but it would have nothing--

THE COURT: (Interrupting) I came out with an average of $3,200 a year without taking into account how much of it came out of the sale of the Graphic Stock.

MR. HANDELMAN: I didn't return that file, your Honor.

MR. JAFFE: Yes, that's returned.

MR. HANDELMAN: By the way, on that file I notice in addition to--in Judge Lupiano's decision, in which he mentions it's from the sale of stock, he also refers to an Appellate Division decision in the companion case, that of Dr. Solomon, and the same facts and repeats it's commercially incredible. I wish your Honor would read that Appellate Division decision as well.

THE COURT: Swear Mr. Handelman in, please.

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MR. HANDELMAN: I was sworn the other day.

THE COURT: The witness has been sworn.

P H I L I P H A N D E L M A N, previously sworn, resumes.

THE WITNESS: Your Honor, what my secretary, Miss Atkins, has done here is take just a few of the names of persons entertained in a particular year, and following through on our records she has indicated that subsequent to the time of that entertainment each of these persons listed paid us fees and has taken that right down, I see, to 1971. And the fees in each of the years, particularly '67, '68--well, it starts before that--were substantial fees in each of the years as a result of that. The earliest I think is '63. And I'm prepared to testify as to these particular people and the fees in the years in which they paid the fees.

MRS. WESTEN: Your Honor, the underlying documents again from this alleged summary are not in evidence. This information has been subpoenaed by the respondent and is not produced in the courtroom, and we object to testimony along these lines without having the original records here with which they can be compared.

THE WITNESS: The original records were brought here at the last session.

MRS. WESTON: They were not shown to the respondent.

THE WITNESS: And they included not only diary entries but also telephone entries, and Miss Atkins had made summaries which were placed in evidence, if my memory serves me, and she was questioned by your Honor separately, I think, as to whether those were based upon the records which she had in court.

I think someone, I forget who, complimented her on having summarized them so she didn't have to turn all the pages. So I think they are in evidence. They are exhibits.

THE COURT: This is a different record. This is a record which, presumably, shows the fees received from certain individuals--

THE WITNESS: (interrupting) Who are mentioned in that other--

THE COURT: --in the diary as having been entertained on the boat.

THE WITNESS: Right, sir.

THE COURT: The respondent objects because the respondent states that the record showing your receipts are not in the courtroom.

THE WITNESS: Well, I'm prepared to testify, your Honor. I have sufficient records--

MRS. WESTEN: (Interrupting) They have been subpoenaed, your Honor. They should be here.

THE WITNESS: I have records here of the receipts of these particular fees.

THE COURT: Well, if you have them, let respondent see them.

THE WITNESS: May I take them one by one?

Here is Mrs. Chapin, for instance--

MRS. WESTEN: (Interrupting) Mr. Handelman, these are just pencil notations, aren't they?

THE WITNESS: This is the way I write, Mrs. Westen. I do not maintain a bookkeeping department. The Internal Revenue has not provided me with those funds.

I have this book showing right through the funds and it lists every fee I received, including if there was an occasional cash fee, which was darn seldom. But all of these are fees and all of these went into my account. They start with the year 1961 and go right up to 1971. If you don't like pencil, I'm sorry, but that's the way it is.

This is a little black book I keep in my desk. This is one record I maintain, and you can question me

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to your heart's content about it. I know all the answers.

MR. WESTEN: Well, your Honor, we'd like the whole little book admitted in evidence.

THE WITNESS: All right.

THE COURT: It will be marked for identification.

THE CLERK: Marked for identification Petitioner's exhibit 34.

(Little black book of Mr. Handelman with pencil notations is received and marked as Petitioner's exhibit 34 for identification.)

THE COURT: Have the parties agreed on the amount chargeable for the use of the boat up to the 274 years?

MRS. WESTEN: Up to the 274 years, yes.

THE COURT: You may proceed, Mr. Jaffe, but the Court would remind you that for the 274 years we have to have an enumerator and denominator, and there is no way from the information which has been submitted thus far to arrive at any ratio, and the law says it has to be used primarily, and that has been construed to be more than half.

MR. JAFFE: Well, our contention is that during the year--well, let's take '63, which is a 274 year, we claim that the amount deducted for boat expenses, $9,107.25, that as a result of having expended these

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sums, the taxpayer has taken in $315,066.33 through 1971. This may not be all of it because some of these people will still bring in matters and some of the matters aren't completely closed, so that all the fees have not as yet been collected.

THE COURT: Yes, but the question isn't whether as a result of taking one client out on the boat--

MR. JAFFE: (Interrupting) Series of clients.

THE COURT: --the taxpayer realizes a fee of a specified amount. The question is whether or not more than half of the time the boat was being used solely for business purposes..

MR. JAFFE: It is our contention that the boat was used a hundred percent of the time for business purposes. You will notice here in one particular exhibit that even the crew men--

MRS. WESTEN: (Interrupting) Your Honor--

THE COURT: (Interrupting) The Court isn't going to be influenced by arguments.

THE WITNESS: I testified that no member of my family participated on the boat.

THE COURT: That doesn't mean it can't be used for purposes other than just business, just because your family wasn't there.

THE WITNESS: I can only give your Honor my testi-

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many, and I do have the records as to the number of people.

THE COURT: I assume that you enjoy going on it yourself, do you not?

THE WITNESS: I enjoy practicing law, too, your Honor.

Where are the summary sheets?

THE COURT: Those are in evidence. Proceed, proceed.

There is only one way to do it: I'll let you proceed in your own way and I will decide the case.

THE WITNESS: The thing that indicates the extent of use as your Honor well knows--

THE COURT: (Interrupting) Well, let me explain one thing to you: When we get into the 274 years we are dealing with more than just a taxpayer's testimony. No reflection on your veracity or integrity.

THE WITNESS: That's starting with '63, your Honor?

THE COURT: Yes. We want to see time, places, records, what was done, and so forth. Then we also, in order to get the denominator, we have to see what the boat was doing the rest of the time.

THE WITNESS: In '63 our records indicate the use on 15 different weekends--

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THE COURT: (Interrupting) Let me ask you this to get to the point: Did you race the boat in 1963?

THE WITNESS: Yes, I did.

THE COURT: How many times?

THE WITNESS: Oh, I couldn't tell. That was not a Bermuda year. That's an even year. I couldn't give your Honor a precise number, but certainly it would be--

THE COURT: (Interrupting) Were you up to the Larchmont Race week?

MRS. ATKINS: I can do that. I can tell you what he raced and what he didn't.

THE COURT: You're not on the stand.

THE WITNESS: If you have that record, just give it to me.

MRS. ATKINS: I don't have it with me, but I can get it.

THE WITNESS: I would say possibly four, five, six times that year. You see, we don't go in Larchmont race week because that's a buoy race. This is an ocean-going craft and we go on the distance races mainly.

Like we had the Vineyard race that year. '63 I don't think we went to Atlantis.

THE COURT: Did you go South on the Southern Racing Circuit?

THE WITNESS: Not in '63.

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THE COURT: We come to '64; what about '64?

THE WITNESS: '64, I think we did go to Bermuda in '64, so that there would be more races in '64.

By the same token there were also more--a greater number of people entertained in '64.

THE COURT: Let me ask you this: You have a facility, Mr. Handelman, which you say primarily is an off-shore racing craft?

THE WITNESS: I said she's an off-shore boat. She's a 36,000 pound boat. We don't go in Long Island Sound. It has changed a great deal. The weather is pretty light.

You mentioned the Larchmont race week, and I tried to point out why we didn't go in that. That would be a nice thing to go in if you had a light boat.

THE COURT: When you take guests out in the boat do you have a crew all the time?

THE WITNESS: No, I handle the boat myself.

THE COURT: Alone?

THE WITNESS: Yes. People always like to pull on a rope, but I can handle the boat myself.

THE COURT: Proceed.

THE WITNESS: The only time I use an employed crew, your Honor, is like at Newport, some place where I'm bringing aboard people for viewing another race, and the

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idea of serving drinks all day isn't--

THE COURT: (Interrupting) How many is your usual crew when you are racing?

THE WITNESS: Racing?

THE COURT: Yes.

THE WITNESS: Eight people.

THE COURT: Who are they?

THE WITNESS: Well, they vary, your Honor.

THE COURT: Can you name them?

THE WITNESS: These are unpaid, of course. You mean the names of some of them?

THE COURT: Yes.

THE WITNESS: Oh, you have to give me a moment, your Honor.

Well, I'll take my current one and that will refresh me a little bit.

THE COURT: Let's get back. Are any of these names that appear on this list of guests names of your crew?

THE WITNESS: Let me answer it this way: There have been a few crew members who have also brought me business, yes.

THE COURT: Let me ask you, on those lists of guests there--

THE WITNESS: (Interrupting) This fellow sometimes

crewed. Wertshafter; he has crewed on the boat. He went into the picture business. We got a little business; it didn't amount to too much. Another one--no. That's the only one of the crew members listed, just one person who was actually crew in the year '64.

THE COURT: These are all unpaid crews?

THE WITNESS: All the crew is unpaid anyway.

THE COURT: They are crewing for the pleasure of it?

THE WITNESS: That's right,sir. So they're really guests. I've had doctors, aviators, people from all walks of life as crew. They're not professional sailors.

THE COURT: Your counsel started out with the allegation that this boat was used solely for business. Now the court realizes that you achieve a certain amount of recognition as a result of any cup race or Bermuda race or something like that. That is not what the law means. It is not an advertising connection.

THE WITNESS: I'm not mentioning that. We have a great deal of advertisement. I'm not mentioning that at all. But take even the Bermuda race, I think Mrs. Atkins mentioned the other day that one of the crew members on that has resulted in the largest case

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we have in the office. That's a Mr. Wendberg of Propulsion Systems. We got a very substantial retaining fee and we have a very large claim pending in New Orleans as a result of that.

Now when you entertain, it's just as entertaining to a crew member who happens to like that sort of thing, and you set up a rapport with that man and that's how you get his business. That's what I did in this instance. That's all my use of the boat was. I was constantly attempting to invite those that I thought were prospects. You can't hit it a hundred percent, but the batting average here seems to be pretty good and improving all the time.

That included both the limited number of races and particularly on these weekends.

Now you've got here men that are heads of large companies. I notice, for instance, Mr. Distal's name appears here. He's head of Bantam Books, and director of National General. It has resulted in very, very substantial fees over the years.

Here's a Mr. Kutner from Chicago. Probably that name is familiar to your Honor as a lawyer out there, who brought in a very--a couple of substantial fees.

Each one on this list--well, I shouldn't say each one on this list--and I'm looking at Exhibit 31--

but a substantial number out of the ones listed on Exhibit 31 appear in these other sheets with the specific time and amount of the fees that they paid to the office. So that we have it two ways. We not only have the fact of the people entertained, but more than 50 percent resulted in fees but that the fees resulted from these people were very substantial in comparison to the expenditure.

THE COURT: Well, I was hoping you wouldn't mention that, Mr. Handelman, because--

THE WITNESS: (Interrupting) I've done something wrong?

THE COURT:----in looking at your returns I added them up here for a year and a half, Mr. Handelman, and I must congradulate you as to your survival. As I stated previously, taking your returns for 1961 through 1965 I come up with an average taxable income of $3,200 a year.

THE WITNESS: Well, your Honor, we're talking about--to simplify it--

THE COURT: (Interrupting) Let's take 1965; when all of this should bear fruit, it shows that you had a net profit of $6,182 from the practice of law. That's not enough to run the boat on.

THE WITNESS: I don't think the net profit, your

Honor, in the figure. The gross in '65, for example, was over $300,000. Now there are many factors that enter into something where you may--certainly it's no news that companies that take in a substantial amount of money sometimes have an even more substantial loss. But if these figures have increased to the point where, as I'm now able to point out to you, the '65 figure was over $300,000.

THE COURT: Now, do you have that exhibit, Mr. Jaffe, there which Mr. Handelman says is taken from the little black book?

MR. JAFFE: Yes, sir.

THE COURT: Do you object to that subject to your right to verify it from the black book?

MRS. WESTEN: We'd like the little black book admitted in evidence.

THE COURT: Mark that.

THE WITNESS: It's been marked as Exhibit 34, your Honor.

MRS. WESTEN: Identified but we'd like it marked in evidence.

THE COURT: Exhibit 34 will be admitted and the summary thereof.

Does that have an exhibit number?

THE CLERK: Yes, your Honor. That's 33, I believe.

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THE WITNESS: No, it doesn't have a number yet.

MR. JAFFE: I'll give you another one, a Xerox copy. Here is the clerk's copy (handing).

THE WITNESS: This is 31, that's 32, this is 33, and that will be 34 (indicating).

MRS. WESTEN: We would like the record to reflect, your Honor, that we have no way of checking these fees into his bank statement to ascertain whether or not in fact they did come in.

THE COURT: The court realizes that. The exhibit merely purports to be a record of a summary of what's in the black book, which the witness has in turn testified is a summary of the fees he collected.

Now, I don't know that it makes it any less admissible whether he put it in the bank or in a safe deposit box, does it?

MRS. WESTEN: That's a question, your Honor.

THE COURT: I mean I'm asking you, is that right or isn't it?

MRS. WESTEN: Well, I would assume that he received the money he could put it where he pleased.

I do have a question to ask your Honor as to whether these records of fees received were contemporaneously prepared with the receipt of the fees? In other words, if the witness received a fee in 1961 would the entry

have been made in 1961?

THE WITNESS: That's right. I would make that myself for my records. My secretary goes by the deposit slips in making any of her records. But my records, which I keep for my purposes, I've always done this since I practiced law, in this little black book which I keep in my desk. In there I record them as I receive them to get some idea as to how badly I'm doing as I go along.

MRS. WESTEN: And the year of receipt?

THE WITNESS: Not only the year but the month and the day.

THE COURT: Mr. Jaffe?

MR. JAFFE: That will be all.

THE COURT: Any further questions you want to ask the witness?

MRS. WESTEN: I have a few. I want to make sure Mr. Jaffe is finished.

THE WITNESS: This hasn't been marked yet.

THE COURT: It's in evidence. Exhibit 33 is the summary, exhibit 34 is the black book.

MR. JAFFE: Yes.

THE COURT: Do you have any further testimony you want of this witness?

MR. JAFFE: No. I think that will cover it.

THE COURT: You may cross-examine, Mrs. Westen.

MRS. WESTEN: Thank you, your Honor.

CROSS-EXAMINATION BY MRS. WESTEN:

Q This boat, Mr. Handelman, is a 46 foot sailing yawl? A Sailing sloop.

Q Do you still own it? A Yes, I still have it.

Q When did you acquire this one?

A I think around 1958, if my memory serves me.

Q And how many would it have sleeping accommodations for? A Six, unless they liked each other very well, then it would be 12.

Q You say that in racing you would require a crew of about eight people? A Eight people.

Q And you say that didn't have a crew when you took people sailing yourself? A When I take people out for the weekend or for a day's sail or something, an evening sail, I don't need a racing crew. You see, when you say eight people, four people are sleeping and four are working and when you're handling racing gear it's different than the gear that you're using when you're cruising. You don't use very much sail on a boat like that when you're taking people out for a comfortable sail. When you're racing, you're trying to kill yourself and it requires a lot--

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Q (Interrupting) Isn't it dangerous to take people out to sea with no crew in a boat of that size?

A First of all, may I say this: You don't take them to sea. Long Island Sound is a sea but you don't take them out in a hurricane and you don't take them across the Atlantic. You don't take them to Bermuda. I wouldn't attempt to take anyone to Bermuda by myself.

Q But you did sail yourself in Bermuda during some of these periods of time? A No. Bermuda we'd only go to race.

Q I see. And you say you would have entered about five or six races in each of these years?

A Yes, yes. --

Q And can you give us an idea of the time that is required for a race, from the time you begin to prepare for the race until the time you return to your mooring?

A I don't know what you mean by "prepare."

Q Why don't you tell us. A You prepare in the spring and you have your boat ready. If it's a race around Stratford Sholl it may take overnight. In other words, if you started out at sometime in the late afternoon, or noon time, depending on the wind; you might start in the morning and take you until the next day to finish or you might start in the morning and finish before midnight the next day, you see. It's a wind thing which I cannot predict in

advance how long it's going to take. If you go in the Vineyard race it will take a whole weekend. That's one that goes up to Massachusettes and around the Vineyard Lightship and back. That's the longest race we have on the Sound. The others are all short, overnight races.

Q And when you participate in these races do you stay and participate in the regatta as well?

A They usually have a party, if that's what you mean, a rendezvous or a party or something where you socialize.

Q When are these races generally held, during what time of the year? A Most of the distance races occur in the early spring. In other words, in May or June. There's very little racing in July and August. Then there may be some in September.

Q And are they held on weekends or during the week? When are they held? A Usually they are held on a Friday over Saturday or sometimes on a Saturday over Sunday.

Q Would you have raced in the Bermuda race in 1964?

A In 1964 I think I did, yes. It's either '64 or '66, and I've been in each one of them ever since. Of course, I raced in them many years before that, too.

Q How long does that take, that race?

A Four to five days.

Q Are there any preliminary preparations that have to

le made for these races? A A great deal.

Q What kind of things do you have to do?

A You have to make sure that your boat is in perfect shape. You have to make sure that your pumps are all ready. You have to have the necessary--there's a requirement of equipment, safety equipment that you have to have aboard, your radio, direction finders have to be in shape, your wind instruments and all those things.

Q And would you have entered the Vineyard race in each of these years, '63, '64, '65?

A Yes, I think so. That's one that occurs around Labor Day.

MR. JAFFE: If your Honor please, I think the respondent is trying to determine the use of the boat on a time basis, little realizing that we have stipulated before that the crew sometimes--

THE COURT: (Interrupting) You haven't stipulated that at all. I've tried to point out to you on several occasions, Mr. Jaffe, that without the denominator here, why I don't see that we can possibly get anywhere in the 274 years.

Now we've got to have an enumerator and a denominator. In other words, unless you really have a log showing how many days, how many hours, and so forth that the boat was in use and how many of that total was in use for

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business and how many was for pleasure, I don't see that there is any way we can meet the test here.

THE WITNESS: We have done that, your Honor. We have the number of days.

THE COURT: I haven't seen it. In fact, your counsel has just objected to Mrs. Westen attempting to elicit that information.

THE WITNESS: I think you should let her elicit it, but we do have the days listed when guests were entertained on the boat.

THE COURT: But, can you tell us, for example, when you were going to race down the Southern Circuit when the boat left New York, how many days it was en-route, how many days it was down there, how many days it was coming back, because a trip like that presumably is not a business trip.

THE WITNESS: Well, your Honor, that's for pleasure. Let me answer that this way: First of all, the Southern Circuit thing, that is a later year.

THE COURT: I'm just using that as an example. All I am saying, Mr. Handelman, is that we do not have in this record, and I don't know that you have either, the basis upon which we can have an enumerator and a denominator with respect to the 274 years.

THE WITNESS: Your Honor, may I answer that?

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THE COURT: If it isn't there, my hands are tied.

THE WITNESS: I think it is, your Honor, and I'd like an opportunity to provide whatever--

THE COURT: (Interrupting) Today was the opportunity, Mr. Handelman.

THE WITNESS: Let me say this: You mentioned if you took your boat South, and your Honor can well realize that we can do some substantial entertaining down there, which I've done in subsequent years. Now to say that it's pleasure to take it down, no. You have to get it down there if you're going to do the entertaining. It is not a pleasure.

THE COURT: The primary reason to take it down is to race it?

THE WITNESS: The primary reason to take it down in the Southern Circuit, I take it primarily there for entertainment and I do down there about six races. That's all they have. It takes a great deal of work to take it down because I have to take it down in stages myself, with one person, go down the waterway and get it down there and get it moored, get it in shape. Then I invite people weekends.

For instance, Christmas weekend I had people down in Daytona. I only was able to get the boat as far as that and I took them to Vero Beach. After this next

race--

THE COURT: (Interrupting) You took the boat to Vero Beach?

THE WITNESS: That's right, sir.

BY MRS. WESTEN:

Q Was this during the winter months?

A Yes. I'm talking about this year.

Q These are six races in addition to whatwould be the summer races?

THE COURT: There is no inlet in Vero Beach, is there?

THE WITNESS:- I say we got as far as Vero Beach, your Honor. We went inland to Daytona, we went out subsequent to Daytona, came in at Cape Canaveral and went from there to Vero, then inland to Palm Beach and then down to--out at Palm Beach to Lauderdale and Miami and around to St. Petersburg. The boat is now in St. Petersburg.

Now, that's the chore part, getting it to where you want to entertain. As I say, the only entertaining so far this winter on the boat was during Christmas week. I will subsequently do some more weekends with it in the coming couple of months. But that Southern thing is an additional use of the boat. Normally you

have ten good weekends in the summer because, as I've pointed out, you do the outfitting in the early spring, it's cold. That's when you also have a few of these races. In May the first race starts and there are no races during the summer, and that's when you do your entertaining.

Then it lays there all week on a mooring or on the dock and you don't necessarily use it for anything during that period, unless you had somebody up for cocktails one night if it happened to be a nice night or something like that. That's how you use the boat.

To say going down with it is a pleasure, I can only say, your Honor, it's a pleasure I could forego. It's a great chore to get it down, and if I didn't think it was a profitable thing to do I wouldn't be doing it.

BY MRS. WESTEN:

Q Mr. Handelman, how long have you been sailing? When did you begin to sail? A Sometime in the '30's.

Q So you've been sailing--so you are quite an expert sailor by this time? A So they say.

Q Have you won some of these races?

A Yes, I have, including winning in the Bermuda and others.

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Q And where do you keep your boat during the off season? Do you dock it at a yacht club?

A It's docked at City Island at all times, winter and summer, unless it's a winter that it happens to go south.

Q And during what period of the year generally would it be docked? A Well, you misunderstand. Docked means tied to a dock. What you mean is when is it hauled out?

Q Yes. A Well, you haul a boat out-- it used to be that everybody hauled out right after Labor Day; now they stay a little later, but most people haul out sometime in October. Usually, all insurance requires you to be hauled out by November 15 or November 1, depending on your policy.

Q Then when is it returned to the water?

A Then usually it's returned to the water May 15.

Q And during the summer do you haul it out of the water and moor it at the same place, in the same general area?

A You don't haul it out. You just tie it to the dock.

Q Okay. A It's a big process to haul this out of the water.

Q And you say that, generally speaking, with the one exception that you named in your testimony, the crew, your racing crew did not consist of your clients, they were not your clients? A I said that a number of matters resulted from crew members, but I said--I pointed

out that one very large matter came from this Propulsion Systems, which is a propeller manufacturer designing company. And that happened to be a man who crewed and went to Bermuda with me on one occasion, too.

Q Who are your crew members generally?

A Well, as I say, they vary. Mr. Wendberg, I've had Mr. Wallacer--I'm just refreshing my recollection from the list here--Mr. Honeyman, a man with General Electric; Frank Baron, John Rainy.

Wait a minute. I have a whole list of names of different people that I've had. Bill Dichter, Peter Crawford, Bobby Coolson--a man from the arbitration society and you probably have seen his name around, secretary to it; Al Constantine--

Q (Interrupting) May I ask what you're reading from?

A I'm reading from my telephone director of friends and crew members. This is Constantine, I don't know if it appears in here, but he had crewed for me and in the past year he's been responsible for about $25,000 in fees.

Q When did he crew for you?

A He crewed for me within the last two years.

Roger Carlson, Alan Baily, Tom Coyne,

You see, the reason I read you so many names when you're looking for only eight, it's not eight because one time one guy can go and another time he can't. So you draw on these

people.

Don Naven, Herb Foote, Haneyman I mentioned, Bill Glendon, whom I've entertained and who has since also become a crew member and has resulted in some fees; Bob Lamkin, Doctor Krinsky, Murray Lieblich, Newton Kirkland, Mike Kotchmer, Doctor Linkoff, who has resulted in some fairly good fees, Jim Keeshan, Jose Macado, Jim Meehan, Kenneth McDonald, Rod Ollinger, Paul Reasneau, John Rainy I think I mentioned before, Bob Sheppard, Walter Slack, Wendberg I mentioned, Peter Vitale, Steve Warsaw, Ed Wymer, Gordon Zearn.

That's about it, that's about the list from which I draw crew members from time to time.

MRS. WESTEN: Your Honor, I think I have no further questions of this witness with respect to this issue.

THE COURT: Any further questions, Mr. Jaffe?

MR. JAFFE: Yes.

REDIRECT EXAMINATION BY MR. JAFFE:

Q Mr. Handelman, you read a list of names and names without their association is rather meaningless. Could you specify some of those names as to what companies they are connected with? They are crew members but they are also connected with certain companies who are possible sources of business, are they not?

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MRS. WESTEN: If he's going to testify in that vein, we would ask him to state specifically when these people went.

THE COURT: He didn't draw his crew from his clients with one exception.

THE WITNESS: I didn't say that, your Honor. Let me make that clear.

THE COURT: I think, Mr. Handelman, this whole line of testimony indicates the reasons why Section 274 was enacted and the difficulty of complying with it without appropriate records. I think that's the problem we are faced with here.

THE WITNESS: Your Honor, I was being very accurate. I said that substantial fees, with the exception of Wendberg, I'm talking about fees running into excess of $15,000, $10,000, came from people mostly who were entertained, and that some fees of a lesser amount came from certain crew members.

One I referred to was--

THE COURT: (Interrupting) Let me interrupt you, Mr. Handelman, and maybe you can explain something that has puzzled the court since my experience probably lies in a different area; but when you speak of substantial fees, for example, from the year 1965 you show $310,522.87; then you showed paid out to other lawyers $200,331.

So that when you're talking about a substantial fee, the proportion that you keep may be relatively small. Is that right?

THE WITNESS: That's true. That's what I pointed out to your Honor that a company may make millions of dollars and end up with a deficit.

THE COURT: That's not usual in the practice of law. Yours is a rather unusual situation.

THE WITNESS: I am basically a litigator, your Honor. I do have quite a few referrals. As you know in our profession, we do pay referrals. So the gross doesn't have--well, it has a reflection on net.

THE COURT: On that basis you pay out more than fifty percent. Is that customary?

THE WITNESS: No, I don't think so, your Honor.

THE COURT: That's what the figures show, Mr. Handelman. It shows taking in $310,000, paying out $200,331, roughly two-thirds.

MRS. WESTEN: Mr. Jaffe, may we see what you're showing your witness?

MR. JAFFE: Yes, it's on the sheets there anyway (exhibiting to Mrs. Westen).

MRS. WESTEN: Stand back here and ask him a question. That's a leading question.

THE COURT: Mr. Jaffe, when it is your turn to

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re-examine you may come back.

The basic problem the Court has in relating the operation of the boat to the business is the relatively low yield from the business. In other words, on the $300,000 in gross fees in 1965 you recorded a net profit of $6,182. That's half of what it costs to operate the boat.

THE WITNESS: Yes.

THE COURT: If you sold the boat and did half the business you'd be better off, according to my figures.

THE WITNESS: Except if you compare the cost of the operation of the boat with reference to that, it's low. There may be some other places where there should be some economies, but I don't think there's anything in the statute that says you can only use a facility if you can demonstrate that you're having a profitable operation.

THE COURT: No, but it was you who brought that question up, Mr. Handelman. You opened up that line of inquiry. I was just trying, again, to point out to you how I needed an enumerator and a denominator.

THE WITNESS: I pointed it out in a different sense. I think what I'm pointing out is sound. That's why we ran this thing down to 1971. I testified the other day, your Honor, that it takes time to develop

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these things and we have a clear picture here that from these people, entertaining over a period of time in the past, there has come a flow, and I have provided your Honor in this exhibit with totals which demonstrate that, number one, the gross has increased as the years go along--

THE COURT: (Interrupting) The problem I see, Mr. Handelman, I believe you had a boat case with the Tax Court once before, didn't you?

THE WITNESS: That's right, sir.

THE COURT: This isn't the first boat case, but the problem I see is that while you are very persuasive and just about trying to get me convinced, I look at the figures and the net never changes.

THE WITNESS: You know, your Honor, I may be stealing the money, as the implication was on that $40,000 check, which we now discover wasn't even made out to me, but the figures are increasing and they are very substantial. Like, for instance, 1971, like the proof of the pudding being in the eating, is that these fees, these substantial fees in 1970 and these substantial fees in '71 which are reflected match up with the names of the people that were entertained way back in 1961 and 1962.

THE COURT: Maybe you should have a forwarding

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lawyer's share in the cost of maintaining the boat.

THE WITNESS: It's a great idea, your Honor.

THE COURT: The problem I see is out of $300,000 you had to pay $200,000 to the fellow that sent the business in. Then it wasn't the boat, it was the guy you were paying the $200,000 to, wasn't it, that should get credit?

THE WITNESS: I'd have to see--I don't think it's in that proportion.

THE COURT: You can argue that in your briefs.

Do you have any further questions, Mr. Jaffe?

MR. JAFFE: No other questions, your Honor.

THE COURT: You have 60 days.

THE WITNESS: Your Honor, when you speak of enumerator and denominator I take it that you want to compare the boat costs--

THE COURT: (Interrupting) Not cost, the useage.

THE WITNESS: To the gross of each year?

THE COURT: No, the total useage. It's the business useare to the total useage.

THE WITNESS: That appears in the other sheets we are giving to your Honor. The only thing you have to remember on that is that you can't look at 52 weeks in the case of a boat facility.

THE COURT: The court realizes that very well,

although if you're moving the boat to Florida and Bermuda--

THE WITNESS: (Interrupting) That's only in the past few years.

THE COURT: I thinkit was in the years I noticed it went at least as far as Palm Beach.

THE WITNESS: I think the first year would be '65 or '66.

THE COURT: Anyway, I would recommend, Mr. Handelman, for the future that you do make a very, very precise log of the movements of this boat. Without an enumerator and denominator I don't see any way of qualifying for primary use.

THE WITNESS: Well, these diaries show the dates, your Honor. You can't do more than that. If you take a ten or even a 15-week--

THE COURT: (Interrupting) I think you have been on other boats and you know precisely what I mean, Mr. Handelman. If you don't want to take my advice, you can struggle with the next judge that takes the next case. This is your second boat case and I'm not charging you for this advice.

Give us your brief dates, Mr. Clerk.

60 days or 45?

MRS. WESTEN: 45.

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THE COURT: Let's have that date.

THE CLERK: Those dates, your Honor, are March 20 and April 19, 1972.

THE COURT: In accordance with the rules, the main briefs will be due concurrently on March 20 and the parties will have until April 19, for a reply thereto.

Case is closed now.

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[Certificate of Reporter omitted]

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Ass-Federal Reporters, Inc.

T. C. Memo. 1973-57

UNITED STATES TAX COURT

PHILIP HANDELMAN and ESTHER HANDELMAN, Petitioners
v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 4913-67. Filed March 7, 1973.

Thomas P. Dougherty, for the petitioners.

Marion L. Weston, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

QUEALY, Judge: Respondent has determined deficiencies and additions to the Federal income tax of

the petitioners as follows:

Year	Income Tax	Addition to the tax Section 6653(a)[1]
1961	$ 5,654.87	$282.74
1962	37,192.35	-
1963	42,249.33	-
1964	1,588.03	-
1965	2,758.78	-

As a result of agreements or concessions made by the parties, together with the failure of the petitioner to present any proof with respect to certain adjustments,[2] the remaining questions for decision are as follows:

(1) Whether the amount of $95,000 received by the petitioner in connection with the purported sale of stock of Graphic Arts Exhibit Building, Inc., constituted ordinary income or the gain from the sale of a capital asset.

(2) Whether the petitioners are entitled to claim deductions for expenses incurred in connection with the maintenance and operation of a 46-foot sailing sloop during the taxable years 1963 to 1965, inclusive.

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1 All statutory references are to the Internal Revenue Code of 1954, as amended, unless otherwise indicated.

2 It is presumed that petitioners have conceded those adjustments not settled by stipulation or to which no evidence was addressed since they have the burden of proof.

[- 3 -]

FINDINGS OF FACT

Some of the facts have been stipulated. The stipulation of facts and exhibits attached thereto are incorporated herein by this reference.

Petitioners are Philip Handelman and Esther Handelman, his wife.[3] Their residence at the time of the filing of the petition herein was in New York, New York. The petitioner is an attorney at law, licensed to practice in the State of New York.

For the taxable years ended December 31, 1961 to December 31, 1965, inclusive, the petitioners filed joint United States income tax returns with the district director of internal revenue, Manhattan District, New York, on the cash basis method of accounting. An amended return for the taxable year 1965 was filed on March 14, 1966.

On or about January 20, 1961, petitioner caused to be organized under the laws of the State of New York, Graphic Arts Exhibit Building, Inc., (hereinafter referred to as "Graphic Arts") for the purpose of erecting and

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[3] Esther Handelman is a petitioner herein solely by virtue of having filed a joint return with her husband. Hereinafter, references to "petitioner" are to Philip Handelman.

leasing space in a building at the site of the New York World's Fair 1964-1965. A total of 200 shares of stock of said corporation were duly authorized.

In June 1961, the petitioner entered into an agreement with Thomas R. O'Connor (hereinafter referred to as "O'Connor"), providing that O'Connor was to be employed by Graphic Arts in exchange for advancing working capital in the amount of approximately $100,000, with the understanding that he was to acquire some stock in the corporation. Following this discussion, O'Connor contacted the petitioner and offered to purchase all of the stock of the corporation.

In the ensuing negotiations, O'Connor acted on behalf of himself and of his partner and financial backer, Joan G. Van de Maele (hereinafter referred to as "Van de Maele").

During 1961, Van de Maele paid the petitioner $25,000 which was reported as ordinary income from his legal practice in the petitioners' joint Federal income tax return for that year.

In December 1961, it was agreed upon that O'Connor and Van de Maele would purchase certain shares of the

stock of Graphic Arts from the petitioner. Van de Maele thereupon executed two notes, dated December 8, 1961, payable to the order of the petitioner on June 8, 1962, in the amounts of $50,000 and $17,000, respectively.

At the same time, Van de Maele executed a note payable to one Dr. A. Alfred Solomon in the amount of $48,000 on account of the purchase of additional shares of Graphic Arts stock.

On February 20, 1962, the sum of $30,000 was transmitted to the petitioner by Van de Maele through the Banco Credito de San Juan, San Juan, Puerto Rico, and credited to the account of petitioner's wife, E. M. Handelman, 295 Madison Avenue, New York, New York, at the Chemical Bank New York Trust Co. By bank check dated March 26, 1962, Van de Maele paid the petitioner the additional amount of $40,000 which was credited to his account at the Chemical Bank New York Trust Co.

On or about June 8, 1962, the two notes payable to the petitioner in the amounts of $50,000 and $17,000, respectively, and the notes payable to Dr. Solomon in the amount of $48,000, were duly presented for payment and were not paid.

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Thereafter, by an agreement dated June 13, 1962, between petitioner and O'Connor, the terms of the proposed sale of the stock of Graphic Arts were modified. O'Connor and Van de Maele executed an additional note in the amount of $59,000 payable September 14, 1962, to the order of the petitioner. Pursuant to the agreement of June 13, 1962, payment of the prior notes aggregating $115,000 which were then in default was to be made on or before June 15, 1962, in exchange for 63 shares of the stock of Graphic Arts. Upon payment of the additional note in the amount of $59,000, the remaining 25 shares of said stock would be delivered to O'Connor.

In the interim, the stock was placed in escrow pursuant to the following agreement:

> IT IS HEREBY AGREED by and between THOMAS R. O'CONNOR the First Party, and PHILIP HANDELMAN, for himself and others, as the Second Party, as follows:
>
> 1) PHILIP HANDELMAN represents that GRAPHIC ARTS EXHIBIT BUILDING INCORPORATED (hereinafter called "GRAPHIC ARTS") is a duly organized and validly existent corporation under the laws of the State of New York, and further makes those representations set forth on Exhibit "A" annexed hereto.

2) The First Party for himself and in representative capacity, is indebted to the Second Party in the sum of ONE HUNDRED SEVENTY FOUR THOUSAND ($174,000) DOLLARS, represented by four (4) non-interest bearing promissory notes in the following sums: FIFTY THOUSAND ($50,000) DOLLARS; SEVENTEEN THOUSAND ($17,000) DOLLARS; FORTY EIGHT THOUSAND ($48,000) DOLLARS and FIFTY NINE THOUSAND ($59,000) DOLLARS, the first three of the above cited notes being presently in default, and aggregating ONE HUNDRED FIFTEEN THOUSAND ($115,000) DOLLARS.

3) The Second Party will deposit with AUSTIN GREY of CHEMICAL BANK NEW YORK TRUST COMPANY, as escrowee, eighty-eight (88) shares of the capital stock of GRAPHIC ARTS, duly endorsed in blank which shares shall be released by said escrowee in accordance with the terms of Paragraphs "4" and "5" hereof.

4) In the event that said three notes in the total amount of ONE HUNDRED FIFTEEN THOUSAND ($115,000) DOLLARS are paid on or before June 15, 1962 said AUSTIN GREY will delivery [sic] sixty-three (63 shares of said eighty-eight (88) shares to THOMAS R. O'CONNOR, or his designee, and will continue to hold in escrow twenty-five (25) shares pending the payment of the note dated June 13, 1962 payable September 14, 1962 in the sum of FIFTY NINE THOUSAND ($59,000) DOLLARS. All voting rights with respect to said twenty-five (25 shares shall be exercisable until an event

of default shall have occurred under the aforementioned note, by the Second Party, and the First Party shall deliver to the escrow agent an irrevocable proxy covering the period from the date of payment of the three (3) notes referred to in Paragraph "4" hereof to the earlier of September 14, 1962, or the payment of the FIFTY NINE THOUSAND ($59,000) DOLLAR note referred to above.

5) In the event that the full amount of said three notes totalling ONE HUNDRED FIFTEEN THOUSAND ($115,000) DOLLARS is not paid on June 15, 1962, the escrowee shall return all papers and documents to PHILIP HANDELMAN.

6) In the event of none-payment [sic] of said FIFTY NINE THOUSAND ($59,000) DOLLAR note, at its maturity, the escrowee will return the said twenty-five (25) shares to the Second Party.

Dated: New York, New York
June 13, 1962

/signed/
Thomas R. O'Connor, First Party

/signed/
Philip Handelman, Second Party

The notes referred to in paragraph 5 of the agreement were not paid, when due, and by letter agreement, dated July 6, 1962, the petitioner and O'Connor extended the date of payment until July 11, 1962. There were no other changes relating to the

June 13, 1962 agreement. None of the notes were paid when due, and the escrow was thereupon terminated and the stock returned to the petitioner.

On or about March 14, 1963, the petitioner delivered certificates representing 104 shares of the capital stock of Graphic Arts to the Bankers Trust Co., as escrowee. The receipt for those shares, dated March 14, 1963, provided that upon notification to the escrowee of the consummation of a loan in the principal sum of $500,000 by and between the Exchange Bank & Trust Co. of Dallas, Texas and Graphic Arts, the Bankers Trust Co., as escrow agent, would deliver to the petitioner a check in the amount of $150,000, and to one Raymond Barger a check in the amount of $10,000 and would forward to the Exchange Bank & Trust Co. of Dallas, or its designee, the 104 shares of the capital stock of Graphic Arts. The payment of $150,000 was intended to satisfy the three notes held by petitioner in the amount of $126,000, together with an additional $24,000.

By receipt of the Bankers Trust Co., dated March 20, 1963, the escrow arrangement and time for

payment were subsequently extended to March 25, 1963. There were no other changes relating to the arrangement expressed in the receipt of the Bankers Trust Co., dated March 14, 1963. Both receipts provided that in the event the loan transaction was not consummated, the stock certificates were to be returned to the petitioner. The loan agreement was not completed, the payments were not made and the escrow was terminated.

Thereafter, in April 1963, the petitioner initiated an action in the Supreme Court of the State of New York, County of New York, against Van de Maele and O'Connor to recover on the promissory notes, the amount of the additional payments provided in the March 1963 escrows, and the amount of certain disbursements, allegedly incurred by the petitioner, which Van de Maele and O'Connor had purportedly agreed to pay.

By order dated December 7, 1965, the Supreme Court of the State of New York, County of New York, granted the petitioner's motion for a summary judgment on the promissory notes. The Court further ordered,

however, "* * * that any judgment against the defendant JOAN G. VAN DE MAELE will await the final determination of the issues with respect to her claim of payment by unpaid and past due advances made to plaintiff, * * *." The Court further denied the petitioner's motion for a summary judgment and severed the action with respect to his alleged claim for an additional $24,000 arising from the March 1963 escrow agreements. The suit against Van de Maele was finally discontinued by agreement between the parties in April 1970 upon the payment by Van de Maele of $89,500, at which time petitioner delivered to the buyer certificates evidencing 64 shares of stock of Graphic Arts.

Pursuant to Section 203-A of the Tax Law of New York State, Graphic Arts was dissolved by proclamation of the secretary of state published on the fifteenth day of December 1965 for nonpayment of taxes since December 31, 1961.

During the years 1963 to 1965, inclusive, the petitioner owned a 46-foot sailing sloop named Chee Chee V. The petitioner incurred expenses (including

depreciation) in connection with the maintenance and operation of his boat, in the amounts set forth below:

1961	$3,857.00
1962	6,395.89
1963	9,107.25
1964	6,849.87
1965	12,255.88

In computing his taxable income on his Federal tax returns for such years, the petitioner claimed the above expenses as a business deduction.

The petitioner is a long time sailing enthusiast, having begun to sail sometime in the 30's and having gained recognition as a sailor by winning the Bermuda race and others. The petitioner raced his boat in several well known races each year, including the Bermuda race and the Martha's Vineyard Race. At such times, various members of the crew were either clients of petitioner or were possible sources of business.

The petitioner maintained no formal records showing the guests entertained on the boat. However, in his office, petitioner maintained diaries and

telephone records from which schedules were prepared showing the occasions upon which petitioner entertained persons on his boat from whom or through whose efforts petitioner obtained legal business.

For the taxable years 1961 and 1962, the parties have agreed that 60 percent of the expenses incurred in the maintenance and operation of the boat were allowable as business expenses. The petitioner has substantiated a similar use for the taxable years 1963 to 1965, inclusive.

OPINION

The principal issue remaining for decision, as stated in the notice of deficiency, is whether certain payments aggregating $95,000 received by the petitioner "in connection with a contract to sell certain shares of Graphic Arts Exhibit Building, Inc., is taxable as ordinary income." At the trial, the parties made certain concessions with respect to the taxable years in which such payments shall be deemed taxable, and the Court will be governed thereby. By reason thereof, we are concerned solely

with the characterization of the income received by the petitioner rather than the year in which such income should be reported for tax purposes.

The facts are not subject to dispute. It appears that in 1961 the petitioner obtained a concession to erect a building for the graphic arts on the site of the New York World's Fair 1964-1965. He organized Graphic Arts for the purpose of erecting and leasing such building and set about to obtain the necessary funds. He offered O'Connor, a former client, the role of "promoter" with the understanding that O'Connor would be given an opportunity to acquire stock in the corporation. O'Connor obtained financial backing from Van de Maele and, acting on her behalf, undertook purchase of the stock of the corporation.

During the years 1961 and 1962, Van de Maele paid or advanced the petitioner a total of $95,000 and gave the petitioner notes aggregating $126,000 on account of such agreement.

[- 15 -]

At various times, the stock of the corporation was placed in escrow to be delivered to O'Connor and Van de Maele upon payment of the notes. Efforts to complete the sale continued until March 25, 1963, when the last extension for the payment of the notes expired and the stock which had been deposited in escrow was returned to the petitioner. Promptly thereafter, petitioner filed suit against O'Connor and Van de Maele and was granted a summary judgment for the amount of the notes.

While respondent argues in his brief that petitioner has failed to prove that the cash payments of $95,000, the characterization of which are in dispute, related to the sale of the stock, there is no basis for such argument. Petitioner's account of the transaction is fully supported by the decision of the New York court in a related case filed by petitioner, as counsel for Dr. A. Alfred Solomon, to recover on the notes given to Solomon by Van de Maele. Solomon v. Van de Maele, 250 N.Y.S. 2d 772 (Sup. Ct. 1964). The notice of deficiency is predicated on the assumption that the payments were received in connection with the sale of such stock, but are taxable as ordinary income because no sale was ever consummated.

[- 16 -]

Where a contract for the sale of property provides that upon a default by the purchaser the seller may keep the property and any amounts paid thereunder as liquidated damages, such amounts have been held taxable as ordinary income. Presumably, this on the theory that there has been no sale but merely the payment of damages. See Harold S. Smith, 50 T.C. 273 (1968), affirmed per curiam 418 F. 2d 573 (C.A. 9, 1969), and cases there cited; Meyer Mittleman, 56 T.C. 171 (1971).

On the other hand, where a sale has been completed and subsequently the buyer, being unable to pay the balance due, agrees to return the property to the seller in discharge of his obligation to pay the balance, this Court has held that the amounts previously paid nevertheless constituted gain from the sale of a capital asset. Alvin B. Lowe, 44 T.C. 363 (1965). See also: Myers v. Commissioner, 287 F. 2d 400 (C.A. 6, 1961), affirming a Memorandum Opinion of this Court; Binns v. United States, 254 F. Supp. 889 (1966), affd. 385 F. 2d 159 (C.A. 6, 1967).

Renegotiation of the terms of the sale does not change the character of the transaction. Harold Wener, 24 T.C. 529 (1955), affd. 242 F. 2d 938 (C.A. 9, 1957).

It is clear from the record in this case that the petitioner was at all times ready and willing to deliver the stock sold to the buyers upon payment of the notes. Under the laws of New York governing this transaction,[4] it appears that "Unless a different intention appears, * * *

> Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed. [N.Y. Pers. Prop. Law, sec. 100 (McKinney 1962)]

See Rosenzweig v. Salkind, 158 N.Y.S. 2d 522 (Sup. Ct. 1956), reversed on other grounds 169 N.Y. Supp. 213 (Sup. Ct. 1957), affd. 183 N.Y.S. 2d 82 (1959).

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4. Art. 5, N.Y. Pers. Prop. Law (McKinney 1962) repealed by section 10-102 of the Uniform Commercial Code, effective September 27, 1964.

Therefore, the ownership passed upon payment of the cash and execution of the notes, leaving petitioner with nothing more than a vendor's lien. See N.Y. Pers. Prop. Law, section 134(1)(a) (McKinney 1962); Newman v. United Distillers Co., Inc., 175 N.Y. Supp. 176 (Sup. Ct. 1919); Rosenzweig v. Salkind, supra. However, we need not go that far. As we view the facts in this case, the respondent is in error. Petitioner, at all times, was attempting to complete the transaction. There was no forfeiture.

When the purchasers failed to pay the notes when due, and after the expiration of each extension or new escrow set up by the petitioner, the petitioner could elect either to take back the stock and call the whole deal off or to file suit on the notes and be prepared to deliver the stock to the purchasers. See N.Y. Pers. Prop. Law, Sections 134 and 144 (McKinney 1962); Solomon v. Van de Maele, supra. See also Doyle's Main Motors v. Davis, 118 N.Y.S. 2d 867 (Sup. Ct. 1953).

If petitioner had elected to terminate the agreement, not only would his right ultimately to collect on the notes be jeopardized, but he might be called upon to refund the cash payments which had been received by him because "a provision for liquidated damages is never read into a contract by implication * * *." People v. Condor of Americas, Inc., 252 N.Y.S. 2d 619 (Sup. Ct. 1964); see also Winkelman v. Winkelman, 203 N.Y. Supp. 63 (Sup. Ct. 1924); cf. Pirman v. Kurtz, 45 N.Y.S. 2d 508 (Sup. Ct. 1943). "* * * [R]ecission can be effective only by returning or tendering back the consideration received." Gilbert v. Rothschild, 280 N.Y. 66, 19 N.E. 2d 735 (1939), and cases there cited.

Obviously, it was to the advantage of the petitioner not to claim a forfeiture but rather to proceed with the collection of the notes, in which event the petitioner would have to be prepared to make delivery of the stock. It is immaterial that when the litigation was finally settled the time for erecting the building at the New York World's Fair had

expired and the stock had become worthless. The fact that the buyers were forced to bear that risk confirms our conclusion that the sum of $95,000 received by the petitioner constituted a long-term gain from the sale of a capital asset within the meaning of section 1222.[5]

During the taxable years 1961 to 1965, inclusive, the taxpayer maintained a 46-foot offshore sailing yacht "Chee Chee V." The parties agree that the cost of maintenance and operation of the yacht during the years in question was, as follows:

1961	$ 3,357.00
1962	6,395.89
1963	9,107.25
1964	6,849.87
1965	12,255.88

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[5] Sec. 1222(3) provides:

(3) Long-term capital gain.--The term "long-term capital gain" means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing gross income.

For the taxable years 1961 and 1962, the parties further agreed that 60 percent of such costs were properly deductible by the petitioner as an ordinary and necessary expense within the meaning of section 162.

For the taxable years 1963 to 1965, inclusive, the respondent has disallowed any deduction on account of the agreed upon costs on the ground that the petitioner failed to comply with the requirements of section 274(a) and (d) with respect to the maintenance of records relating to the use of the yacht.

Insofar as material herein, section 274 provides:

(a) Entertainment, Amusement, or Recreation.--

(1) In general.--No deduction otherwise allowable under this chapter shall be allowed for any item--

* * * * * * *

(B) Facility.--With respect to a facility used in connection with an activity referred to in subparagraph (A), unless the taxpayer establishes that the facility was used primarily for the furtherance of the taxpayer's trade or business and that the item was directly related to the active conduct of such trade or business,

and such deduction shall in no event exceed the portion of such item directly related to, or, in the case of an item described in subparagraph (A)

directly preceding or following a substantial and bona fide business discussion (including business meetings at a convention or otherwise), the portion of such item associated with, the active conduct of the taxpayer's trade or business.

(2) Special rules.--For purposes of applying paragraph (1)--

(A) Dues or fees to any social, athletic, or sporting club or organization shall be treated as items with respect to facilities.

(B) An activity described in section 212 shall be treated as a trade or business.

* * * * * * *

(d) Substantiation Required.--No deduction shall be allowed--

(1) under section 162 or 212 for any traveling expense (including meals and lodging while away from home),

(2) for any item with respect to an activity which is of the type generally considered to constitute entertainment, amusement, or recreation, or with respect to a facility used in connection with such an activity, or

(3) for any expense for gifts,

unless the taxpayer substantiates by adequate records or by sufficient evidence corroborating his own statement (A) the amount of such expense or other item, (B) the time and place of the travel, entertainment, amusement, recreation, or use of the facility, or the date and description of the gift, (C) the business purpose of the expense or other

> item and (D) the business relationship to the taxpayer of persons entertained, using the facility or receiving the gift. The secretary or his delegate may by regulations provide that some or all of the requirements of the preceding sentence shall not apply in the case of an expense which does not exceed an amount prescribed pursuant to such regulations.

With respect to the question whether the facility was "primarily" used by the petitioner for the purpose of "entertaining" clients and others who might be instrumental in forwarding litigation to the petitioner in furtherance of his business, petitioner submitted a list compiled from his office records showing the names of various guests entertained aboard the yacht. In a substantial number of instances, the petitioner testified with respect to the relationship of the named individuals to an actual or potential source of litigation. While the petitioner did not account for all occasions on which the yacht may have been used by him, in our opinion such records were adequate to meet the test of primary use with respect to the facility. LaForge v. Commissioner, 434 F. 2d 370 (C.A. 2, 1970), reversing 53 T.C. 41 (1969); William F. Sanford, 50 T.C. 823 (1968), affirmed per curiam 412 F. 2d 201 (C.A. 2, 1969), certiorari denied 396 U.S. 841 (1969).

[- 24 -]

Having met the primary use test with respect to the facility, it then becomes necessary to determine the specific amount or cost which the petitioner is entitled to deduct as a business expenditure under section 162.

In this respect, the actual amounts expended are not in question. The parties have agreed upon the costs of operating and maintaining the yacht during the years in question. For the most part, these were general expenses which can only be chargeable on the basis of the ratio of business use of the facility to its total use. In the mind of the petitioner, it was all business. With that, we must disagree. We are satisfied, however, that the petitioner has substantiated his right to the deduction of not less than 60 percent of such costs for the taxable years 1963 to 1965, inclusive. Our conclusion is buttressed by reference to the fact that this was the basis agreed upon by the parties for the taxable years 1961 and 1962 in the absence of the more specific requirements of section 274 with respect to the maintenance

of records. While it must be admitted that a more precise result could have been achieved if petitioner had kept a formal log, comparable information supplied from contemporary records is an acceptable substitute. LaForge v. Commissioner, supra.

The respondent determined that an addition to the tax for negligence or intentional disregard of rules and regulations was due from the petitioners under the provisions of section 6653(a) for the taxable year 1961. That determination is presumptively correct and in the absence of evidence from the petitioner to rebut it, we are constrained to sustain the respondent. James W. England, Jr., 34 T.C. 617 (1960); James S. Reily, 53 T.C. 8 (1969).

To reflect concessions made by the parties, and the conclusions reached herein,

Decision will be entered under Rule 50.

[-2-] [Audit Statement (pp. 2-4) attached to Respondent's Computation for Entry of Decision]

FORM 3611 (REV. MAR. 1970)

INDIVIDUAL INCOME TAX

STATEMENT SCHEDULE 1

NAME: Philip Handelman and Esther Handelman

	TAXABLE YEARS ENDED 12/31/61	12/31/62	12/31/63
TAXABLE INCOME OR ADJUSTED GROSS INCOME AS SHOWN IN: ☐ RETURN AS FILED ☐ PRELIMINARY LETTER DATED ☒ STATUTORY NOTICE DATED June 30, 1967	$23,749.08	$76,752.62	$84,033.37
INCREASES (DECREASES) IN INCOME: *(See attached explanation of items)*			
(a) Ordinary income	(25,000.00)	(70,000.00)	(95,000.00)
(b) Long term capital gain	12,500.00	20,000.00	11,341.11
(c) Boat expense	(462.60)		(5,464.35)
(d) Other promotion and entertainment	(1,067.87)	(2,878.15)	
(e) Depreciation	(1,028.15)		
(f) Rent	(300.00)		
(g) Office expense		(600.00)	
(h) Medical expense	(523.83)		(1,031.89)
TAXABLE INCOME AS REVISED OR ADJUSTED GROSS INCOME AS REVISED	7,866.63	23,274.47	(6,121.76)
TAX COMPUTATION: TAX	1,650.66	6,524.30	None
TAX SURCHARGE			
TAX PLUS SURCHARGE	1,650.66	6,524.30	None
LESS: TAX CREDITS Dividends Received Credit	41.41	51.10	
SUBTOTAL	1,609.25	6,473.20	None
ADD: SELF-EMPLOYMENT TAX	216.00	225.60	
TAX FROM RECOMPUTING PRIOR YEAR INVESTMENT CREDIT			
TAX LIABILITY	1,825.25	6,698.80	None
LIABILITY PREVIOUSLY ASSESSED	1,224.37	221.46	None
DEFICIENCY *(Overassessment)*	$ 600.88	$ 6,477.34	None

Addition to tax for negligence
Section 6653(a) - 5% 30.04

FORM 3611
REV. MAR. 1970

INDIVIDUAL INCOME TAX

STATEMENT SCHEDULE 2

NAME

Philip Handelman and Esther Handelman

	TAXABLE YEARS ENDED 12/31/64	12/31/65	
TAXABLE INCOME OR ADJUSTED GROSS INCOME AS SHOWN IN:			
☐ RETURN AS FILED			
☐ PRELIMINARY LETTER DATED			
☒ STATUTORY NOTICE DATED June 30, 1967	$7,867.43	$16,535.38	
INCREASES (DECREASES) IN INCOME: *(See attached explanation of items)*			
(d) Promotional and entertainment expense	(4,109.92)	(7,353.53)	
(g) Office expense	(600.00)		
(h) Medical expense	(188.38)	(220.59)	
TAXABLE INCOME AS REVISED OR ADJUSTED GROSS INCOME AS REVISED	2,969.13	8,961.26	
TAX COMPUTATION — TAX	494.60	1,591.48	
TAX SURCHARGE			
TAX PLUS SURCHARGE	494.60	1,591.48	
LESS: TAX CREDITS			
Dividends Received Credit	15.38		
SUBTOTAL	479.22	1,591.48	
ADD: SELF-EMPLOYMENT TAX	259.20	259.20	
TAX FROM RECOMPUTING PRIOR YEAR INVESTMENT CREDIT			
TAX LIABILITY	738.42	1,850.68	
LIABILITY PREVIOUSLY ASSESSED	109.28	910.33	
DEFICIENCY (Overassessment)	$ 629.14	940.35	

[-4-]

Philip Handelman and Esther Handelman — Statement

Taxable Years Ended December 31, 1961
to December 31, 1965, Inclusive

Explanation of Adjustments

(a) & (b) The Tax Court determined that the proceeds of the sale of stock constituted a long-term capital gain. To give effect to the foregoing:

(a) ordinary income is decreased, as follows:

Year	Amount
12/31/61	$25,000.00
12/31/62	70,000.00
12/31/63	95,000.00

(b) Long-term capital gain is increased as follows (1963 capital gain is reversed):

Year	Amount	Capital Gain Deduction	Net Amount
12/31/61	$25,000.00	$12,500.00	$12,500.00
12/31/62	40,000.00	20,000.00	20,000.00
12/31/63	11,341.11	-	11,341.11

UNITED STATES TAX COURT

PHILIP HANDELMAN and ESTHER HANDELMAN, Petitioners, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	Docket No. 4913-67

DECISION

Pursuant to the opinion of the Court filed March 7, 1973, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there is no deficiency in income tax due from, or overpayment due to, the petitioners for the taxable year 1963;

That there are deficiencies in income taxes due from the petitioners for the taxable years 1961, 1962, 1964 and 1965 in the amounts of $600.88, $6,477.34, $629.14 and $940.35, respectively;

That there is an addition to the tax due from the petitioners, pursuant to Int. Rev. Code of 1954, § 6653(a), for the taxable year 1961, in the amount of $30.04.

(signed) William H. Quealy

Judge.

Entered: AUG 16 1973

* * * * *

It is hereby stipulated that the foregoing decision is in accordance with the opinion of the Court and the respondent's computation, and that the Court may enter this decision without prejudice to the right of either party to contest the correctness of the decision entered herein.

/s/ Thomas P. Dougherty
Counsel for Petitioners

(Sgd) LAWRENCE B. GIBBS - EHH

LAWRENCE B. GIBBS,
Acting Chief Counsel,
Internal Revenue Service.

UNITED STATES TAX COURT

UNITED STATES TAX COURT FILED

1973 NOV 13 PM 3 09

PHILIP HANDELMAN and ESTHER HANDELMAN,	)	
Petitioners-Appellees,	)	
v.	)	Docket No. 4913-67
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent-Appellant.	)	

NOTICE OF APPEAL

Notice is hereby given that the Commissioner of Internal Revenue hereby appeals to the United States Court of Appeals for the Second Circuit from the decision of this Court entered in the above-captioned proceeding on the 16th day of August, 1973.

At the time the taxpayers filed their petition with the Tax Court seeking a redetermination of their tax liability, their residence was in New York, New York. Accordingly, proper venue

for review of the Tax Court's decision is in the United States Court of Appeals for the Second Circuit.

/s/ Scott P. Crampton
Scott P. Crampton
Assistant Attorney General
Department of Justice

/s/ Meade Whitaker
Meade Whitaker
Chief Counsel
Internal Revenue Service

OF COUNSEL:
Chris J. Ray
Attorney
Internal Revenue Service

CERTIFICATE OF SERVICE

It is hereby certified that service of this record appendix has been made on opposing counsel by mailing four copies thereof on this 17th day of April, 1974, in an envelope, with postage prepaid, properly addressed to him as follows:

Robert Trien, Esquire
360 Lexington Avenue
New York, New York 10017

Meyer Rothwacks (enb)
MEYER ROTHWACKS,
Attorney.